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February 28, 2008

FILED ELECTRONICALLY
The Honorable Charles L.A. Terreni
Chief Clerk
South Carolina Public Service Commission
Post Office Drawer 11649
Columbia, South Carolina 29211

RE: Petition for Approval of Nextel South Corporation's Adoption of the Interconnection Agreement between Sprint Communications L.P., Sprint Spectrum L.P. d/b/a Sprint PCS and BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina d/b/a AT&T Southeast, Docket No. 2007-255-C

Petition for Approval of NPCR, Inc. d/b/a Nextel Partners' Adoption of the Interconnection Agreement between Sprint Communications, L.P./Sprint Spectrum L.P. d/b/a Sprint PCS and BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina d/b/a AT&T Southeast, Docket No. 2007-256-C

Dear Mr. Terreni:

Enclosed for filing is **Nextel's Brief in Support of Nextel's Adoption of the BellSouth-Sprint ICA** in the above-referenced dockets.

A CD containing the Sprint-AT&T ICA and AT&T-Sprint ICA 3-year Extension Agreement will be filed with the Commission and served on ORS and AT&T/BellSouth in this matter under separate cover via hand-delivery.

If you have any questions or need additional information, please do not hesitate to contact me.

Very truly yours,

John J. Pringle, Jr.

JJP/cr
cc: Patrick D. Turner, Esquire (via electronic and hand-delivery)
Nannette S. Edwards, Esquire (via electronic and hand-delivery)
William R. Atkinson, Esquire (via electronic mail service)
Mr. Joe M. Chiarelli (via electronic mail service)
Enclosures

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

IN THE MATTER OF PETITION FOR APPROVAL OF NEXTEL SOUTH CORP.'S ADOPTION OF THE INTERCONNECTION AGREEMENT BETWEEN SPRINT COMMUNICATIONS L.P., SPRINT SPECTRUM L.P. D/B/A SPRINT PCS AND BELLSOUTH TELECOMMUNICATIONS, INC. D/B/A AT&T SOUTH CAROLINA D/B/A AT&T SOUTHEAST	)	Docket No. 2007-255-C
IN THE MATTER OF PETITION FOR APPROVAL OF NPCR, INC. D/B/A NEXTEL PARTNERS' ADOPTION OF THE INTERCONNECTION AGREEMENT BETWEEN SPRINT COMMUNICATIONS L.P., SPRINT SPECTRUM L.P. D/B/A SPRINT PCS AND BELLSOUTH TELECOMMUNICATIONS, INC. D/B/A AT&T SOUTH CAROLINA D/B/A AT&T SOUTHEAST	)	Docket No. 2007-256-C

NEXTEL'S BRIEF IN SUPPORT OF NEXTEL'S ADOPTION OF THE BELLSOUTH-SPRINT ICA

Pursuant to the Public Service Commission of South Carolina's ("Commission") *Order on Procedural Motion*[1] entered in the above consolidated dockets, Nextel South Corp. and NPCR, Inc., d/b/a Nextel Partners (collectively, "Nextel") respectfully submit this brief in support of Nextel's adoption of the existing interconnection agreement between BellSouth Telecommunications, Inc., d/b/a AT&T South Carolina ("AT&T") and Sprint[2] (the "Sprint ICA").

[1] "Order on Procedural Motion", Docket Nos. 2007-255-C and 2007-256-C – Order No. 2008-120 (issued February 20, 2008) (*"Order on Procedural Motion"*).
[2] Sprint Communications Company Limited Partnership a/k/a Sprint Communications Company L.P., Sprint Spectrum L.P. (collectively referred to herein as "Sprint").

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Nextel has sought to adopt the Sprint ICA, which the Commission can approve under *either* Section 252(i) of the Telecommunications Act of 1996 (the "Act")[3] or the Merger Commitments which were imposed on AT&T by the Federal Communications Commission's ("FCC") Order approving the merger of AT&T Inc. and BellSouth Corporation.[4] AT&T has asserted five objections to Nextel's adoption request.[5] Three of AT&T's objections oppose Nextel's request to adopt the Sprint ICA based on Section 252(i), and two oppose Nextel's request to adopt the Sprint ICA based on Merger Commitment 7.1.[6] In opposition to Nextel's adoption of the Sprint ICA under Section 252(i) of the Act, AT&T asserts:

1) The Sprint ICA has expired, therefore, Nextel did not seek adoption within a reasonable time under FCC Rule 47 C.F.R. § 51.809(c);

2) Since Nextel provides only wireless service, it cannot adopt the Sprint ICA which addresses a unique mix of wireline and wireless items; and,

3) Nextel's adoption could appear to violate the FCC's Triennial Review Remand Order ("*TRRO*").

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[3] 47 U.S.C. § 252(i).

[4] *See In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control,* Memorandum Opinion and Order, Ordering Clause ¶ 227 at p. 112 and Appendix F at p. 147, WC Docket No. 06-74 (Adopted: December 29, 2006, Released: March 26, 2007) ("*Merger Order*"). Specific condition(s) are hereinafter referred to as the "Merger Commitment(s)". "Reducing Transaction Costs Associated with Interconnection Agreements" is the "seventh" un-numbered category of identified Merger Commitments in Appendix F and have been referred to as the interconnection Merger Commitments "7.1", "7.2", "7.3" and "7.4".

[5] Early in these proceedings AT&T also asserted an objection to Nextel's adoption request based on a purported failure by Nextel to invoke the dispute resolution provisions under a prior interconnection agreement. AT&T, however, voluntarily withdrew this objection in its prefiled testimony. *See* "Direct Testimony of P.L. (Scot) Ferguson", Docket Nos. 2007-255-C and 2007-256-C (filed October 30, 2007) ("*Ferguson Direct*") at p. 18, l. 7-17.

[6] *Merger Order,* Appendix F at p. 149, Merger Commitment 7.1: "The AT&T/BellSouth ILECs shall make available to any requesting telecommunications carrier any entire effective interconnection agreement, whether negotiated or arbitrated, that an AT&T/BellSouth ILEC entered into in any state in the AT&T/BellSouth 22-state ILEC operating territory, subject to state-specific pricing and performance plans and technical feasibility, and provided, further, that an AT&T/BellSouth ILEC shall not be obligated to provide pursuant to this commitment any interconnection arrangement or UNE unless it is feasible to provide, given the technical, network, and OSS attributes and limitations in, and is consistent with the laws and regulatory requirements of, the state for which the request is made."

As to Merger Commitment 7.1, AT&T asserts:

1) The FCC has exclusive jurisdiction to address Nextel's adoption of the Sprint ICA under Merger Commitments 7.1; and,

2) Merger Commitment 7.1 is inapplicable to Nextel's adoption request because Nextel seeks to adopt an ICA that was approved by this Commission, rather than "port-in" an ICA from another state.

None of AT&T's objections are sustainable. The Sprint ICA is not "expired", having been expressly extended for three years to March 19, 2010 pursuant to an amendment approved by this Commission - thereby eliminating AT&T's first objection that Nextel had not sought adoption within a "reasonable time" pursuant to FCC Rule 51.809(c). AT&T's second objection, to the effect that Nextel is a "wireless-only carrier" that cannot adopt the Sprint ICA because it also includes terms that pertain to CLEC-wireline service, is no more than an argument that Nextel cannot adopt the Sprint ICA because it is not "similarly situated" to AT&T as the original parties to the Sprint ICA. Any argument that Nextel must be "similarly situated" to AT&T as were the original Sprint parties to the Sprint ICA is: contrary to the express provisions of FCC Rule 51.809(a); was previously raised by legacy-BellSouth and rejected by the FCC when it adopted its "all-or-nothing" interpretation of § 252(i); and, has also been rejected by subsequent case law that makes clear an ILEC cannot avoid making an ICA available for adoption under the "all-or-nothing" rule based on the existence of terms that the ILEC claims a subsequently adopting carrier is incapable of using.

AT&T's suggestion that both a wireless carrier and a wireline carrier are necessary under the Sprint ICA, and its third objection to the effect that a wireless carrier only adoption may violate the FCC's *TRRO* decision regarding the use of UNEs for

wireless services, are contrary to the express terms of the Sprint ICA. Specifically, *the Sprint ICA does not require both Sprint PCS and Sprint CLEC to remain parties throughout its term but, instead, contains express provisions that affirmatively contemplate that either Sprint entity can adopt another ICA and the remaining Sprint entity can continue to operate under the Sprint ICA.* Further, as a Sprint affiliate, Nextel is fully aware of the Sprint ICA post-*TRRO* amendment language that already expressly addresses the *TRRO* restriction on the use of UNEs for exclusively wireless only services.

AT&T's fourth objection, that the FCC has exclusive jurisdiction over the Merger Commitments, is contrary to the holdings of several state Commissions, including this Commission, which recognize that the states have concurrent jurisdiction over enforcement of the Merger Commitments. And, AT&T's fifth objection, which contends Merger Commitment 7.1 is limited to situations where a carrier seeks to "port-in" an out-of-state ICA, would not only require the Commission to re-write 7.1 to include an affirmative "port-in" requirement but also ignores the fact that 7.1 is directly traceable to carrier concerns regarding AT&T's pre-merger dilatory tactics with respect to "in-state" adoptions. Further, even if a "port-in" limitation existed under Merger Commitment 7.1, Nextel's request to adopt the region-wide Sprint ICA is broad enough on its face to meet AT&T's tortured interpretation – i.e., to "port" the Sprint ICA from any of the eight legacy BellSouth states where it also exists "into" South Carolina.

Finally, Nextel anticipates AT&T may urge the Commission to defer any decision to the FCC for "clarification" regarding Nextel's adoption of the Sprint ICA based on AT&T's Merger Commitment 7.1. No such deferral, however, is warranted. As recognized by the Kentucky Public Service Commission ("Kentucky PSC") in

considering and rejecting similar objections in Kentucky that AT&T has raised to Nextel's adoption in South Carolina, Nextel is entitled to adopt the Sprint ICA pursuant to Section 252(i) of the Act *independent of AT&T's Merger Commitments, thereby rendering any FCC clarification of AT&T's Merger Commitments moot.*[7] Nextel submits that there is no reason for a different result in South Carolina than in Kentucky.

For the reasons stated above and explained in greater detail below, none of AT&T's objections are legally sustainable. Accordingly, the Commission should deny each of AT&T's objections, find that Nextel is entitled to adopt the Sprint ICA as a matter of law, and direct the parties to immediately execute an adoption agreement to implement such finding.

II. FACTS AND PROCEDURAL BACKGROUND

On December 29, 2006, the FCC authorized the merger of AT&T Inc. and BellSouth Corporation. In approving the merger, the FCC ordered as a Condition of its grant of authority to complete the merger that the merged entity and its ILEC affiliates

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[7] *See In the Matter of Sprint Communications Company L.P. and Sprint Spectrum L.P. d/b/a Sprint PCS for Arbitration of Rates, Terms and Conditions of Interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky d/b/a AT&T Southeast,* Order issued September 18, 2007, Kentucky PSC Case No. 2007-00180 (finding concurrent jurisdiction; denying AT&T Motion to Dismiss; dismissing AT&T Issue 2 which attempted to force new contract provisions upon Sprint CLEC and Sprint PCS; and, finding commencement date for 3-year extension of Sprint-BellSouth ICA to be December 29, 2006) (the "*Kentucky 3-year Extension Order*", attached hereto as **Exhibit A**); *In the Matter of Adoption by Nextel West Corp. of the Existing Interconnection Agreement by and between BellSouth Telecommunications, Inc. and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P.* and *In the Matter of Adoption by NPCR, Inc. d/b/a Nextel Partners of the Existing Interconnection Agreement by and between BellSouth Telecommunications, Inc. and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P.,* Kentucky PSC Orders issued December 18, 2007, Case Nos. 2007-00255 and 2007-00256 (granting Nextel's requests to adopt the Sprint-BellSouth ICA and denying AT&T's Motions to Dismiss) (the "*Kentucky Adoption Order*", attached hereto as **Exhibit B**); Kentucky PSC Orders issued February 18, 2008, Case Nos. 2007-00255 and 2007-00256 (denying AT&T Kentucky's Motions for Reconsideration raising, among other things, belated and unsubstantiated objection based on 47 C.F.R. 51.809(b)(1)) (the "*Kentucky Reconsideration Order*", attached hereto as **Exhibit C**). But for the caption of the case and identification of the applicable Nextel entity within each Order, the Kentucky Adoption and Reconsideration Orders are identical in Case Nos. 2007-00255 and 2007-00256 and, therefore, Exhibits B and C are the referenced Orders from Case No. 2007-00255.

(which include AT&T South Carolina) are required to comply with the Merger Commitments that were voluntarily proposed by AT&T Inc. and BellSouth Corporation.[8]

Merger Commitment 7.1 imposes upon AT&T an obligation to make available to "any" requesting telecommunications carrier "any" entire effective interconnection agreement, whether negotiated or arbitrated, that AT&T entered into in "any" state in AT&T, Inc.'s 22-state ILEC operating territory (subject to certain limitations that AT&T has not even raised in these proceedings).[9] As an interconnection agreement previously approved by the Commission, AT&T is also required by Section 252(i) of the Act to make the Sprint ICA available to Nextel for adoption.[10]

On May 18, 2007, Mark G. Felton, of Sprint Nextel, sent a letter to AT&T on behalf of Nextel to exercise Nextel's right to adopt the Sprint ICA pursuant to AT&T Inc.'s Merger Commitments and Section 252(i).[11] Mr. Felton's May 18, 2007 letter specifically identified the interconnection agreement that Nextel seeks to adopt in these proceedings as "the 'Interconnection Agreement By and Between BellSouth Telecommunications, Inc. and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P.' dated January 1, 2001

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[8] *See Merger Order*, Ordering Clause ¶ 227 at page 112, WC Docket No. 06-74 (Adopted: December 29, 2006, Released: March 26, 2007) ("IT IS FURTHER ORDERED that as a condition of this grant AT&T and BellSouth shall comply with the conditions set forth in Appendix F of this Order.") and Appendix F. A copy of the Table of Contents and Appendix F to the *Merger Order* is attached to *AT&T's Motion to Dismiss* as Exhibit B.

[9] *See* Merger Commitment No. 7.1.

[10] 47 USC § 252(i) provides: "A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."

[11] *See* "Petition for Approval of [Nextel/NPCR, Inc.] Adoption of the BellSouth-Sprint Interconnection Agreement", Docket Nos. 2007-255-C and 2007-256-C (filed July 2, 2007) ("*Petition*") at ¶ 10, 1st sentence, Mark Felton's May 18, 2007, letter and enclosures attached to the *Petition* as Exhibit B, and "AT&T South Carolina's Motion to Dismiss and, in the Alternative, Answer", Docket Nos. 2007-255-C and 2007-256-C (filed August 10, 2007) ("*Motion to Dismiss*" or "*Answer*" as applicable), *Answer* at ¶10 admitting *Petition* ¶ 10 1st sentence and *Petition* Exhibit B; "Prefiled Direct Testimony of Mark G. Felton" (filed October 16, 2007) ("*Felton Direct*") at p. 8, l. 4 – 11.

('Sprint ICA') as amended, filed and approved in each of the 9-legacy BellSouth states" of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee.[12]

The Sprint ICA in these proceedings is the same 1,169 page interconnection agreement, as amended, for which Sprint sought and obtained a three-year extension in the Docket No. 2007-215-C.[13] An amendment to the Sprint ICA that was entered into in April, 2006, specifically amended the Sprint ICA to incorporate changes resulting from the *TRRO* issued by the FCC (hereinafter the "*TRRO Amendment*").[14]

At the time of Mr. Felton's May 18, 2007 letter, and continuing thereafter, the Nextel entities, Sprint CLEC and Sprint PCS, were and continue to be separate entities "either directly or indirectly wholly owned by, and are under common control, as

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[12] *Petition* Exhibit B at p. 1.

[13] *See Petition* Exhibit B at p. 3; *see also* "Petition for Arbitration of Sprint Communications Company L.P. and Sprint Spectrum L.P.-AT&T" at ¶ 7, Docket 2007-215-C (filed May 29, 2007) ("Sprint and AT&T South Carolina previously entered into an Interconnection Agreement that was initially approved by the Commission in Docket No. 2000-23-C. By mutual agreement, the Interconnection Agreement has been amended from time to time. On information and belief, Sprint believes all such amendments have likewise been filed by AT&T with the Commission. A true and correct copy of the Parties' current, 1,169 page Interconnection Agreement, as amended, can be viewed on AT&T's website at: http://cpr.bellsouth.com/clec/docs/all_states/800aa291.pdf, and "BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina's Motion to Dismiss and, in the Alternative, Answer" ¶ 11, Docket No. 2007-215-C (filed June 22, 2007) (AT&T admits the allegations in Paragraph 7 of the Petition); *see also*, Nextel *Petition* ¶ 8 and first three sentence of ¶ 9 Docket Nos. 2007-255-C and 2007-256-C (filed July 2, 2007) ("The Sprint ICA for which Nextel seeks adoption approval has been amended from time to time, and all such amendments have been filed by AT&T South Carolina with the Commission. A true and correct copy of the current, 1,169 page Sprint ICA, as amended, can be viewed on AT&T South Carolina's website at: http://cpr.bellsouth.com/clec/docs/all_states/800aa291.pdf, and AT&T *Answer* ¶ 8-9, Docket No. 2007-255-C and 2007-256-C (August 10, 2007) (AT&T South Carolina admits the allegations in Paragraph 8 and first three sentences of Paragraph 9 of the Petition"). It has, however, recently come to Nextel's attention that the foregoing URL address link is apparently no longer operable. Accordingly, for the convenience of the Commission, Commission Staff, and the ORS, Nextel has prepared and is filing herewith a compact disc that contains a true and correct downloaded "PDF" version of the 1,169 page Sprint ICA as it was viewable via the stated URL address as of 1st quarter, 2007, prior to the most recent extension amendment approved by the Commission. The compact disc also contains a "PDF" version of the Sprint ICA three-year extension Amendment as approved pursuant to the Commission's January 23, 2008 *Order Approving Amendment to Interconnection Agreement* in Docket No. 2007-215-C.

[14] *See* Sprint ICA at pages "CCCS 873 of 1169"-"CCCS 1165 of 1169" and *Ferguson Direct* Exhibit PLF-5 which reflects pages "CCS 873 of 1169"-"CCCS 882 of 1169" from the April, 2006 Sprint ICA Amendment (collectively the "*TRRO Amendment*").

subsidiaries under the holding company Sprint Nextel Corporation."[15] Based on the foregoing, Mr. Felton's May 18, 2007 letter specifically advised AT&T that:

> The Nextel entities are wholly owned subsidiaries of Sprint Nextel Corporation, as are Sprint Communication Company L.P. ('Sprint CLEC') and Sprint Spectrum L.P. ('Sprint PCS'). Although neither Nextel nor Sprint CLEC consider it either necessary or required by law, to avoid any potential delay regarding the exercise of Nextel's right to adopt the Sprint ICA, Sprint CLEC stands ready, willing and able to also execute the Sprint ICA as adopted by Nextel in order to expeditiously implement Nextel's adoption.[16]

Mr. Felton also enclosed Nextel's completed AT&T forms regarding Merger Commitment 7.1 and 7.2,[17] as well as an adoption document that Nextel requested AT&T to execute in order to implement Nextel's adoption of the Sprint ICA.[18]

On May 30, 2007, Eddie A. Reed, Jr., of AT&T, responded to Mr. Felton's May 18, 2007, letter. The basis asserted by Mr. Reed for AT&T's refusal to grant Nextel's request to adopt the Sprint ICA was a claimed lack of understanding regarding the applicability of the Merger Commitments to Nextel's adoption requests, and an assertion that the Sprint ICA was not available for adoption because it was expired, in arbitration, and not adopted within a reasonable period of time as required by FCC Rules 47 C.F.R. § 51.809(c).[19]

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[15] *See* "Order on Procedural Motion", Docket Nos. 2007-255-C and 2007-256-C – Order No. 2008-120 (filed February 20, 2008) (*"Order on Procedural Motion"),* Exhibit 1 Stipulation of Fact at ¶¶ 6-13; "Rebuttal Testimony of Mark G. Felton" (filed November 6, 2007) (*"Felton Rebuttal"*) at p. 7, l. 17 – p. 9, l. 10.

[16] *Petition* Exhibit B at p. 2; *Felton Direct* at p. 8, l. 13 – 17.

[17] Merger Commitment 7.2 prohibits AT&T from denying an adoption on the grounds the requested ICA has not yet been amended to reflect "changes of law". *See* Merger Commitment 7.2. AT&T, however, affirmatively states in *Ferguson Direct* at p. 8, l. 22– 23 that "AT&T's denial of Nextel's opt-in request is not based on any 'change of law' issues." Accordingly, Nextel's Brief in Support does not further address Merger Commitment 7.2.

[18] *Petition* Exhibit B at p. 3 and enclosures; *Felton Direct* at p. 8, l. 8 – 11.

[19] *See Petition* ¶ 14, Eddie A. Reed Jr. May 30, 2007, letter attached to the *Petition* as Exhibit C, *Answer* ¶14 admitting Exhibit C as Mr. Reed's May 30, 2007 letter; and *Felton Direct*, p. 9, l. 4 – 13.

As a result of AT&T's refusal to honor Nextel's requests to adopt the Sprint ICA, on July 2, 2007, Nextel filed its *Petition* in Dockets 2007-255-C and 2007-256-C seeking Commission approval of Nextel's adoption of the Sprint ICA. On August 10, 2007, AT&T filed its *Motion to Dismiss* and *Answer* in each docket and on October 9, 2007, the Commission found it reasonable to fully consolidate the proceedings for consideration and resolution.[20]

In the *Petition*, Nextel stated that pursuant to both Section 252(i) of the Act and the Merger Commitments set forth in the FCC's *Merger Order*[21], Nextel had adopted the Sprint ICA in its entirety and requested Commission approval of such adoption.[22] Nextel acknowledged that Sprint and AT&T had a dispute regarding the term of the Sprint ICA, specifically referring to the then-pending South Carolina Sprint-AT&T arbitration Docket No. 2007-215-C.[23] Nextel also advised the Commission of its notice to AT&T regarding Nextel's adoption of the Sprint ICA, as well as AT&T's refusal to voluntarily acknowledge and honor Nextel's adoption rights.[24]

In its *Motion to Dismiss* and *Answer*, AT&T asserted that "the interpretation and enforcement of the merger conditions resulting from the ... FCC ... merger proceeding

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[20] "Order Granting Motion For Consolidation of Dockets", Docket Nos. 2007-255-C and 2007-256-C – Order No. 2007-724 (October 9, 2007).
[21] *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control,* Memorandum Opinion and Order, Ordering Clause ¶ 227 at p. 112, WC Docket No. 06-74 (Adopted: December 29, 2006, Released: March 26, 2007) ("*Merger Order*") ("IT IS FURTHER ORDERED that as a condition of this grant AT&T and BellSouth shall comply with the conditions set forth in Appendix F of this Order."). A copy of the Table of Contents and Appendix F to the *Merger Order* is respectively attached as Exhibit A to both the *Petition* and *Nextel's Response* to AT&T's *Motion to Dismiss*.
[22] *See Petition* at pp. 1 - 4.
[23] *Id.* at p. 5 ¶ 9; *see also, In the Matter of Petition of Sprint Communications Company L.P. and Sprint Spectrum L.P. d/b/a Sprint PCS for Arbitration of Rates, Terms and Conditions of Interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T South Carolina d/b/a AT&T Southeast,* Docket No. 2007-215-C (filed April 11, 2007) ("Sprint-AT&T arbitration" or "Docket No. 2007-215-C").
[24] *Id.* at p. 5 ¶ 10 – p. 7 ¶ 15.

are within the exclusive jurisdiction of the FCC"[25], and "Nextel is attempting to adopt an expired agreement and thus its adoption does not comply with applicable FCC rules".[26] On August 20, 2007, *Nextel's Response* to AT&T's *Motion to Dismiss* which detailed the well-established precedent that identified the Commission's authority to acknowledge Nextel's exercise of its rights to adopt the Sprint ICA under the Act and the FCC *Merger Order;*[27] and, demonstrated the timeliness of Nextel's adoption request, particularly in light of the fact that Sprint had exercised its own right to extend the Sprint ICA three years, resulting in the ICA not expiring until March 19, 2010.[28]

On September 13, 2007, the Commission entered its Order to hold AT&T's *Motion to Dismiss* in abeyance so as to "make a fully reasoned determination in this case."[29] Thereafter, between October 16, 2007 and November 13, 2007, testimony was filed by Nextel witness Mark G. Felton and AT&T witness P.L. (Scot) Ferguson.[30]

It is by AT&T witness Ferguson's testimony that AT&T first asserted that: Nextel cannot adopt the Sprint ICA under Section 252(i) of the Act because: Nextel "provides only wireless service"; the Sprint ICA "addresses a unique mix of wireline and wireless items"[31]; and, Nextel's adoption "could erroneously appear to allow" Nextel to purchase

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[25] *Motion to Dismiss* at p. 1.
[26] *Id.*
[27] *See* "Nextel's Response to AT&T South Carolina's Motion to Dismiss", at p. 8 – 20, Docket Nos. 2007-255-C and 2007-256-C (filed July 2, 2007) ("*Nextel Response*").
[28] *Id.* at p. 20 – 22.
[29] *See* "Order Holding Motion To Dismiss in Abeyance" Docket No. 2007-255-C – Order No. 2007-622 and Docket No. 2007-256-C – 2007-621 (September 13, 2007).
[30] *Felton Direct*; *Ferguson Direct*; *Felton Rebuttal*; and, "*Surrebuttal Testimony of P.L. (Scot) Ferguson*") (filed November 13, 2007) ("*Ferguson Surrebuttal*").
[31] *Ferguson Direct*, p. 9, l. 22 – p. 10, l. 2 ("Nextel is not seeking to adopt the Sprint interconnection agreement 'upon the same terms and conditions as provided in the agreement' because the Sprint agreement addresses a unique mix of wireline and wireless items. Nextel, however, provides only wireless service and in fact, is not even certificated to provide wireline services in South Carolina.").

Unbundled Network Elements ("UNEs"") contrary to the *TRRO*[32]. It is also the first time AT&T asserted that Merger Commitment 7.1 is inapplicable to Nextel's adoption request because Nextel is seeking to adopt an ICA that was approved by this Commission, rather than "port-in" an ICA from another state[33]. Mr. Ferguson concedes, however, that the reasons he discusses for AT&T's opposition to Nextel's adoption under Section 252(i) "are primarily legal in nature",[34] to be fully addressed in briefs and oral argument. Accordingly, to the extent warranted, any further filed testimony of the parties is addressed in Section III of this Brief.

On December 7, 2007, Sprint and AT&T filed a *Joint Motion* in the Sprint-AT&T Arbitration Docket No. 2007-215-C for approval of an amendment to the Sprint ICA that provided the relief requested by Sprint in its arbitration Petition in that docket, i.e., to extend the term of the Sprint ICA for a period of three years.[35] On January 23, 2008, the Commission approved the amendment to the Sprint ICA which in fact extended the fixed term of the Sprint ICA for three years from March 20, 2007 to March 19, 2010 and closed the Sprint-AT&T Arbitration Docket No. 2007-215-C.[36]

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[32] *Ferguson Direct*, p. 10, l. 4-5 ("allowing Nextel to adopt the Sprint interconnection agreement would result in an agreement that could appear to be contrary to FCC rulings and internally inconsistent") and p. 17, l. 1-10 (referring to *TRRO* and express prohibition already built-in to the Sprint ICA to prohibit UNE being purchased for exclusive "wireless services", but failing to explain further speculation that "[i]f Nextel were allowed to adopt the Sprint agreement, some portions of the adopted agreement could erroneously appear to allow Nextel to purchase UNEs from AT&T South Carolina, while this provision prohibits it from doing so").

[33] *Ferguson Direct*, p. 7, l. 4 – p.8, l. 11.

[34] *See Ferguson Direct,* p. 9, l. 20 – p. 10, l. 9.

[35] *See* "Joint Motion to Approve Amendment", Sprint-AT&T Arbitration Docket No. 2007-215-C, ¶2 (Dec. 7, 2007) ("*Joint Motion*").

[36] "Order Approving Amendment to Interconnection Agreement", Sprint-AT&T Arbitration Docket No. 2007-215-C – Order No. 2008-27 (January 23, 2008) ("*Order Approving Amendment to Interconnection Agreement*"). Nextel specifically requests the Commission take administrative notice of the record in the Sprint-AT&T Arbitration Docket No. 2007-215-C.

On February 20, 2008, the Commission entered its *Order on Procedural Motion* granting the parties' *Joint Procedural Motion*[37] and ruled that it will decide the issues presented in these consolidated dockets on the basis of the identified Formal Record. The Formal Record includes the parties' filed Stipulations of Fact[38], "each party's respectively filed pleadings and exhibits, the testimony and exhibits the parties have prefiled in these consolidated dockets, the interconnection agreement for which Nextel seeks adoption, and such publicly available information of which the Commission appropriately may take notice pursuant to applicable statutes, rules or regulations."[39]

III. DISCUSSION

A. NEXTEL IS ENTITLED TO ADOPT THE SPRINT ICA PURSUANT TO SECTION 252(i) OF THE ACT

1) Nextel has sought adoption of the Sprint ICA within a reasonable time under FCC Rule 47 C.F.R. § 51.809(c).

Section 252(i) of the Act states:

> A local exchange carrier shall make available any interconnection, service or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

Subsection (c) of the FCC Rule that implements Section 252(i) of the Act, 47 C.F.R. § 51.089, further states:

> (c) Individual agreements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under section 252(h) of the Act.

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[37] "Joint Procedural Motion", Docket Nos. 2007-255-C and 2007-256-C (filed February 8, 2008) ("*Joint Procedural Motion*").
[38] *Order on Procedural Motion,* Exhibit 1.
[39] *Id.* at p. 2.

AT&T's 51.809(c)-based objection that the Sprint ICA was "expired" and, therefore, was not adopted by Nextel within a "reasonable period of time", was premised upon the Commission's decision to defer ruling in the Sprint-AT&T Arbitration Docket as to whether or not the Sprint ICA could be extended three years pursuant to Merger Commitment 7.4.[40] Citing the Commission's deferral in Order No. 2007-683 in Docket No. 2007-215-C at p. 10, Mr. Ferguson contends in these consolidated dockets that a) the extent to which Sprint can continue operating under the Sprint ICA was "therefore uncertain", and b) the Commission should take no action on Nextel's request in this docket until there has been a determination by the FCC "on the extent to which Sprint may continue operating under the [Sprint ICA] that Nextel seeks to adopt."[41]

Albeit not a determination from the FCC, a determination has in fact been made by this Commission that Sprint may continue to operating under the Sprint ICA that Nextel seeks to adopt. Specifically, by its January 23, 2008 *Order Approving Amendment to Interconnection Agreement*, this Commission approved a Sprint/AT&T jointly submitted amendment to the Sprint ICA in Docket No. 2007-215-C that provided the relief requested by Sprint in its arbitration Petition in that docket, i.e., to extend the term of the Sprint ICA for a period of three years from March 20, 2007 to March 19, 2010.[42]

Based upon the authorities cited in *Nextel's Response* to AT&T's *Motion to Dismiss*, any AT&T claim that Nextel is not seeking to adopt the Sprint ICA within a

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[40] *See Ferguson Direct* at p. 3, l. 18-22. *Merger Order,* Appendix F at p. 150, Merger Commitment 7.4: "The AT&T/BellSouth ILECs shall permit a requesting telecommunications carrier to extend its current interconnection agreement, regardless of whether its initial term has expired, for a period of up to three years, subject to amendment to reflect prior and future changes of law. During this period, the interconnection agreement may be terminated only via the carrier's request unless terminated pursuant to the agreement's "default" provisions."

[41] *Ferguson Direct* at p. 3, l. 22 – p. 4, l. 9.

[42] *Order Approving Amendment to Interconnection Agreement*", Docket No. 2007-215-C.

"reasonable period of time" is certainly eliminated by the simple fact that more than two years currently remains in the term of the Sprint ICA.[43] This Commission has specifically refused to restrict a carrier's 252(i) right to adopt an existing ICA even where there may be *six months or less* left in the term of the ICA being adopted. In the *Alltel* case, BellSouth's position was that "Alltel should not be allowed to opt into an existing interconnection agreement that has less than six months to run before it expires."[44] In rejecting BellSouth's position the Commission found that:

> ... the Interconnection Agreement should not contain a six-month prior-to-termination restriction. While the Commission recognizes that there should be some limit on the length of time to opt into an interconnection agreement, the Commission further recognizes that a six-month time period may not be reasonable in all circumstances. Therefore, the Commission rejects the language proposed by BellSouth."[45]

On virtually identical facts to this case, the Kentucky Public Service Commission recently rejected AT&T's objections to Nextel's adoption of the Sprint ICA in Kentucky under Section 252(i) of the Act. After ordering an extension of the Sprint ICA for three years to result in its term being extended in Kentucky to December 29, 2009, the Kentucky PSC found that there was a reasonable time left to the Sprint ICA, thereby making Nextel's adoption of it lawful.[46] There simply is no basis in fact or law for any continued AT&T 51.809(c)-based objection to Nextel's adoption of the Sprint ICA under Section 252(i) of the Act.

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[43] *Nextel Response* at p. 20-22.
[44] "Order on Arbitration", *In Re: Petition of ALLTEL Communications, Inc. for Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 Respecting an Interconnection Agreement with BellSouth Telecommunications, Inc.*, Docket No. 2001-31-C-Order No. 2001-328 at pp. 21-22 (April 16, 2001) ("*Alltel*").
[45] *Id.* at p. 24.
[46] *Kentucky Adoption Order*, at p. 2-3.

2) AT&T's attempt to prevent Nextel's adoption of the Sprint ICA under Section 252(i) based on Nextel's status as a "wireless-only" carrier is a discriminatory practice that has been expressly rejected by the FCC, the Courts and other Commissions.

AT&T contends Nextel is not seeking to adopt the Sprint ICA under the "upon the same terms and conditions" because the Sprint ICA "addresses a unique mix of wireline and wireless items" and Nextel "provides only wireless services".[47] Mr. Ferguson states that the Sprint ICA "reflects the outcome of gives and takes that would not have been made if the agreement addressed only wireline services or only wireless services" and, cites a single sentence out of context from Attachment 3, Section 6.1 which refers to the bill-and-keep arrangement within the Sprint ICA.[48] Mr. Ferguson goes on to conclude that allowing Nextel to adopt the Sprint ICA "would disrupt the dynamics" of the terms and conditions in the Sprint ICA to result in AT&T "los[ing] the benefits of the bargain" that it had negotiated with Sprint CLEC and Sprint PCS, and then cites to three provisions of the Sprint ICA that Mr. Ferguson believes would be "unusual" for AT&T to agree to with a "stand-alone wireless" or "stand-alone CLEC" carrier.[49]

Notwithstanding Mr. Ferguson's characterizations of the Sprint ICA, or what AT&T may or may not consider "usual", *neither AT&T's pleadings in these consolidated dockets, nor Mr. Ferguson's Direct or Surrebuttal testimony raise, much less proffer a scintilla of cost-based evidence, to prove that AT&T incurs any greater cost – as that term is used in the context of 51.809(b)(1)*[50] *– to provide services that Nextel may use under the Sprint ICA than it costs AT&T to provide the exact same services to the Sprint*

[47] *Ferguson Direct* at p. 9, l. 22 – p.10, l. 2; p. 12, l. 5-8.
[48] *Id.* at p. 13, l. 6-11.
[49] *Id.* at p. 13, l. 13 – p. 14, l. 20.
[50] 47 C.F.R. § 51.809(b) states: "The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that: (1) The costs of providing a particular agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement ...".

entities or, pursuant to 51.809(b)(2), that the provision of the Sprint ICA to Nextel is not technically feasible.

The essence of AT&T's position is that Nextel is a stand-alone wireless carrier that is not in the same position to AT&T as were Sprint CLEC and Sprint PCS when they negotiated the Sprint ICA.[51] AT&T's overlooks the obvious affiliate relationships between Nextel and the Sprint entities[52] and, as further explained below, requiring Nextel to be "similarly situated" before it can adopt the Sprint ICAs is contrary to the express provisions of 47 C.F.R. § 51.809(a), and is a discriminatory practice that has been rejected by not only the FCC and the Courts, but also the Kentucky PSC in the context of Nextel's request to adopt the Sprint ICA.

47 C.F.R. § 51.809(a) states:

> (a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any agreement in its entirety to which the incumbent LEC is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. *An incumbent LEC may not limit the availability of any agreement only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the original party to the agreement.* [Emphasis added].

In July of 2004, the FCC revisited its interpretation of 252(i) to reconsider and eliminate what was originally known as its "pick-and-choose" rule, which permitted requesting carriers to select only the related terms that they desired from an incumbent LEC's existing filed interconnection agreements, rather than an entire interconnection

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[51] *See Ferguson Surrebuttal* at p. 3, l. 3-14.

[52] Nextel has the exact same affiliate relationship to the very same Sprint CLEC that is party to the Sprint ICA. *See Order on Procedural Motion,,* Exhibit 1 Stipulation of Fact at ¶¶ 6-13; *Felton Rebuttal* at p. 7, l. 17 – p. 9, l.. 10. Further, although not considered legally necessary, Sprint CLEC has always been offered, and stood ready, to execute the Sprint ICA as adopted by Nextel. *See Petition* Exhibit B at p. 2; *Felton Direct* at p. 8, l. 13 – 17.

agreement. The FCC eliminated the "pick-and-choose" rule and replaced it with the "all-or-nothing" rule. The FCC concluded that the original purpose of 252(i), protecting requesting carriers from discrimination, continued to be served by the all-or nothing rule:

> We conclude that under an all-or-nothing rule, requesting carriers will be protected from discrimination, as intended by section 252(i). *Specifically, an incumbent LEC will not be able to reach a discriminatory agreement for interconnection, services, or network elements with a particular carrier without making that agreement in its entirety available to other requesting carriers.* If the agreement includes terms that materially benefit the preferred carrier, other requesting carriers will likely have an incentive to adopt that agreement to gain the benefit of the incumbent LEC's discriminatory bargain. Because these agreements will be available on the same terms and conditions to requesting carriers, the all-or-nothing rule should effectively deter incumbent LECs from engaging in such discrimination.[53]

The FCC recognizes that the primary purpose of the Section 252(i) adoption process has been to ensure that an ILEC does not discriminate in favor of any particular carriers,[54] and that a carrier seeking to adopt an existing ICA under 252(i) "shall be permitted to obtain its statutory rights on an expedited basis."[55] Where a LEC proposes to treat one carrier differently than another, the incumbent LEC must prove to the state Commission that such differential treatment is justified - which AT&T has not even attempted to do. The fact a carrier serves a different class of customers, or provides a different type of service, does not bear a direct relationship with the costs incurred by the

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[53] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No.01-338, Second Report and Order, 19 FCC Rcd, 13494 at ¶ 19 (2004) ("*Second Report and Order*").

[54] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd, 15499, 16139 at ¶ 1315 (1996) ("*Local Competition Order*").

[55] *Id.* at ¶ 1321.

LEC to interconnect with that carrier or on whether interconnection is technically feasible.[56]

As set forth in the FCC's *Second Report and Order*, AT&T's pre-merger parent, BellSouth Corporation, contended that incumbent LECs should be permitted to restrict 252(i) adoptions to "similarly situated" carriers.[57] In explaining its risks associated with the "pick and choose" rule in the context of a potential bill-and-keep scenario, BellSouth stated that if it agreed to bill-and-keep and "construct[s] contract language specific to this situation, *there is still risk that CLECs who are not similarly situated will argue they should be allowed to adopt the language, or parts thereof.*"[58] (Emphasis Added). The scenario contemplated a CLEC with a very specific business plan, customer base and bill and keep provisions that BellSouth contended in other circumstances would be extremely costly to BellSouth.[59] Notwithstanding such assertions, the FCC held:

> We also reject the contention of at least one commentator that incumbent LECS should be permitted to restrict adoptions to "similarly situated" carriers. We conclude that section 252(i) does not permit incumbent LECs to limit the availability of an agreement in its entirety only to those requesting carriers serving a comparable class of subscribers or providing the same service as the original party to the agreement. Subject to the limitations in our rules, the requesting carrier may choose to initiate negotiations or to adopt an agreement in its entirety *that the requesting carrier deems appropriate for its business needs.* Because the all-or-nothing rule should be more easily administered and enforced than the current rule, we do not believe that further clarifications are warranted at this time.[60]

Subsequent to the *Second Report and Order* AT&T's other predecessor, SBC, attempted yet a further spin to the "similarly situated" argument in an effort to avoid

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[56] *Id.* at ¶ 1318.
[57] *Second Report and Order* at ¶ 30 and n. 101.
[58] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No.01-338, BellSouth Affidavit of Jerry D. Hendrix at ¶ 6 (May 11, 2004) (attached hereto as **Exhibit D**).
[59] *Id.*
[60] *Second Report and Order* at ¶ 30 (emphasis added).

filing and making available in its entirety all of the terms of an agreement it had entered into with a CLEC named Sage Telecom.[61] In *Sage*, SBC and Sage Telecom entered into a "Local Wholesale Complete Agreement" ("LWC") that included not only products and services subject to the requirements of the Act, but also certain products and services that were not governed by either §§ 251 or 252. Following the parties' press release and filing of only that portion of the LWC that SBC and Sage considered to be specifically required under Section 251 of the Act, other CLECs filed a petition requiring the filing of the entire LWC. The Texas Commission found the LWC was an integrated agreement resulting in the entire agreement being an interconnection agreement subject to filing and thereby being made available for adoption by other CLECs pursuant to 252(i).

On appeal, SBC argued that "requiring it to make the terms of the entire LWC agreement with Sage available to all CLECs is problematic because there are certain terms contained in it, which for practical reasons, it could not possibly make available to all CLECs."[62] The federal district court rejected this argument stating:

> [SBC's] argument proves too much. The obligation to make all the terms and conditions of an interconnection agreement to any requesting CLEC follows plainly from § 252(i) and the FCC's all-or-nothing rule interpreting it. The statute imposes the obligation for the very reason that its goal is to discourage ILECs from offering more favorable terms only to certain preferred CLECs. SBC's and Sage's appeal to the need to encourage creative deal-making in the telecommunications industry simply does not show why specialized treatment for a particular CLEC such as Sage is either necessary or appropriate in light of the Act's policy favoring nondiscrimination.[63]

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[61] *Sage Telecom, L.P. v. Public Utility Commission of Texas,* 2004 U.S. Dist. LEXIS 28357 (W.D. Tex.) (*"Sage"*) (attached hereto as **Exhibit E**).
[62] *Id.* at *23.
[63] *Id.* at **23-24.

In Kentucky, AT&T opposed Nextel's adoption of the Sprint ICA under Section 252(i) based on *almost* identical grounds.[64] As in this case, AT&T asserted in Kentucky that:

- because Nextel is only a wireless carrier, it could not avail itself of the network elements provided within the Sprint ICA that AT&T negotiated with both Sprint's wireless and wireline entities;
- because of this "unique" mix, the Sprint ICA "reflects the outcome of negotiated gives and takes that would not have been made if the agreement addressed only wireline service or wireless service";
- the terms of the Sprint ICA apply only to an entity that provides both wireless and wireline service;
- AT&T rarely enters into an interconnection agreement addressing both wireline and wireless services; and,
- Allowing Nextel to adopt the Sprint ICA would "disrupt the dynamics of terms and conditions [and AT&T] would lose the benefits of the bargain negotiated with those parties", citing the Attachment 3, Section 6.1. bill-and-keep arrangements.[65]

The Kentucky PSC recognized that the method for adopting an interconnection agreement is intended to be simple and expedient. Accordingly, the Kentucky PSC found that AT&T's argument is "antithetical to the very purpose of 47 U.S.C. § 252(i), which is to allow telecommunications providers to enter into interconnection agreements on the same footing as each other", and the "all-or-nothing" rule was clearly intended to prohibit this kind of discrimination:[66]

> AT&T cannot play favorites in a market and determine which businesses succeed and which fail by offering more advantageous terms to one party and lesser terms to another. If AT&T can prevent Nextel, or any requesting carrier, from adopting the Sprint ICA or any other interconnection agreement by simply asserting that some of the provisions

[64] Unlike Kentucky, where AT&T asserted an untimely and unsubstantiated objection based on 47 C.F.R. § 51.809(b)(1), as previously indicated, neither AT&T's pleadings, nor Mr. Ferguson's testimony asserted any objection based on 51.809(b)(1).
[65] *Kentucky Reconsideration Order* at p. 6-7.
[66] *Id.* at p. 13.

> of the interconnection agreement cannot apply to the requesting carrier, then the very purpose of the all-or-nothing rule is thwarted. Most requesting carriers' business plans or structures differ from one another, and, therefore, it would be difficult to comprehend a situation in which any requesting carrier could adopt an interconnection agreement and have all of the provisions apply to it. If AT&T Kentucky's argument is to be believed, then it would result in changing almost every adoption proceeding into an arbitration.[67]

Based on the FCC's *Second Report and Order*, *Sage* and the *Kentucky Reconsideration Order*, AT&T cannot prevent Nextel's adoption of the Sprint ICA based on assertions that Nextel is a stand-alone wireless carrier that may not be able to use all of the provisions of the Sprint ICA. Similarly, these rulings construing the FCC's all-or-nothing 252(i) rule demonstrate that AT&T's contention that it entered into an "unusual" agreement it would not ordinarily enter into with a wireless or wireline carrier on a stand-alone basis cuts *against*, not in favor of, AT&T, and compels the approval of Nextel Partners' adoption of the Sprint ICA.

3) The Sprint ICA does not require the presence of a wireless and wireline carrier, and a Nextel adoption would not be contrary to the *TRRO*.

In addition to being contrary to the law, AT&T's argument that Nextel cannot adopt the Sprint ICA under 252(i) because it is a stand-alone wireless carrier is based on the *erroneously assumed premise* that the Sprint ICA *requires* both a wireless party and a wireline party to the agreement for it to be an effective agreement. AT&T has not and cannot, however, cite to any provision of the agreement that *requires* the presence of both a wireless and wireline entity--because no such provision exists. Indeed, AT&T conveniently avoided pointing the Commission to the very language in Attachment 3, § 6.1 that clearly demonstrates that both Sprint entities are not required to remain as parties to the Sprint ICA for it to remain an effective agreement.

[67] *Id.* at p. 14.

In discussing "gives and takes", Mr. Ferguson states "Attachment 3, Section 6.1 of the Sprint ICA, for instance, expressly states that "The Parties' agreement to establish a bill-and-keep compensation arrangement was based upon extensive evaluation of costs incurred by each party for the termination of traffic."[68] What the balance of Section 6.1 goes on to make clear, however, is that either Sprint entity can actually opt out of the Sprint ICA into another agreement under 252(i) and the Sprint ICA would continue as to the remaining Sprint entity. Additionally, the bill and keep provisions would also continue as long as the Sprint entity that opted out of the Sprint ICA did not opt into another agreement that required AT&T to pay reciprocal compensation. Attachment 3, Section 6.1 of the Sprint ICA, in its entirety, states:

> Compensation for Call Transport and Termination for CLEC Local Traffic, ISP-Bound Traffic and Wireless Traffic is the result of negotiation and compromise between BellSouth, Sprint CLEC and Sprint PCS. The Parties' agreement to establish a bill and keep compensation arrangement was based upon extensive evaluation of costs incurred by each party for the termination of traffic. *Specifically, Sprint PCS provided BellSouth a substantial cost study supporting its costs. As such the bill and keep arrangement is contingent upon the agreement by all three Parties to adhere to bill and keep. Should either Sprint CLEC or Sprint PCS opt into another interconnection arrangement with BellSouth pursuant to 252(i) of the Act which calls for reciprocal compensation, the bill and keep arrangement between BellSouth and the remaining Sprint entity shall be subject to termination or renegotiation as deemed appropriate by BellSouth.* [Emphasis added].

The foregoing demonstrates two things. First, AT&T (then BellSouth) entered into the bill and keep arrangement out of concern *over additional Sprint PCS cost-study supported charges to terminate AT&T originated traffic,* not any increase in cost to AT&T to provide termination services to Sprint PCS or Sprint CLEC.[69] AT&T has not

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[68] *Ferguson Direct* at p. 13, l. 6-11.

[69] *See In Re: Petition by Sprint PCS for Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Pursuant to Section 252 of the Communications Act*, Florida Public Service

contended, because it cannot, that AT&T will incur any additional costs to provide the exact same AT&T services to Nextel over its cost to provide such services to Sprint PCS. Second, either of the Sprint entities is clearly free to opt out of the Sprint ICA and into any other AT&T agreement under § 252(i) at any time, and the remaining Sprint entity can continue to operate under the Sprint ICA. Additionally, if for example, it happened to be Sprint CLEC that opted into a stand-alone AT&T CLEC agreement (under which the compensation is indeed typically bill and keep), the existing bill-and-keep arrangement with Sprint PCS *continues* under the Sprint ICA. Thus, there simply is no affirmative requirement that both a wireline and wireless Sprint entity remain joint parties to the Sprint ICA throughout the entirety of the agreement. With the removal of that otherwise erroneously assumed premise, AT&T's argument that the Sprint ICA requires both a wireline and wireless carrier at the table is just plain wrong, and nothing can change that simple indisputable fact.

AT&T's argument that Nextel's adoption of the Sprint ICA could be internally inconsistent and appear to violate the FCC's *TRRO* prohibition against using UNEs for the exclusive provision of mobile wireless service is, at best, a red herring. It is simply indisputable that by virtue of the April, 2006 *TRRO Amendment* to the Sprint ICA, Sprint and AT&T completely replaced Attachment 2 regarding the provisioning of UNEs (which are short-hand referenced in Attachment 2 as "Network Elements", *see* Attachment 2, § 1.1).[70] As a result of that Amendment, Attachment 2, § 1.5 specifically

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Commission, Docket No. 000761-TP (filed June 23, 2000). Sprint PCS had produced a cost study in the Florida Public Service Commission arbitration to demonstrate that its costs of termination significantly exceeded those of BellSouth. It is the Florida cost study that is referenced in paragraph 6.1 of the Sprint ICA.

[70] *See* Sprint ICA at pages "CCCS 873 of 1169"-"CCCS 1165 of 1169" and *Ferguson Direct* Exhibit PLF-5 which reflects pages "CCS 873 of 1169"-"CCCS 882 of 1169" of the April, 2006 *TRRO Amendment.*

provides that "Sprint shall not obtain a Network Element for the exclusive provision of mobile wireless services or interexchange services." Thus, consistent with the *TRRO*, just as the Sprint ICA already precludes Sprint from obtaining UNEs for the exclusive use of Sprint PCS, the Sprint ICA would likewise preclude Nextel from obtaining UNEs for such purposes. There simply is no dispute between the parties regarding the unavailability of UNEs for the exclusive provision of wireless service under the Sprint ICA.[71]

B. NEXTEL IS ENTITLED TO ADOPT THE SPRINT ICA PURSUANT TO AT&T MERGER COMMITMENT 7.1

1) The Commission has concurrent jurisdiction to enforce AT&T's Merger Commitments.

There is no substantive distinction between AT&T's position in these consolidated dockets that the FCC has "exclusive jurisdiction" to address Nextel's adoption of the Sprint ICA under the Merger Commitments, and AT&T's position in Docket No. 2007-215-C that the FCC had "sole jurisdiction" to address Sprint's extension of the Sprint ICA under the Merger Commitments. Based upon the extensive federal case law cited by Sprint, the language of the *Merger Order* itself, and inconsistency in AT&T's position[72], the Commission held in Docket No. 2007-215-C that it has concurrent jurisdiction over the Merger Commitments.[73]

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[71] *Felton Rebuttal* at p. 11, l. 13 - p. 12, line 3.

[72] "Order Ruling on Arbitration", at p.7, Docket No. 2007-215-C – Order No. 2007-683 (October 5, 2007) ("we find the testimony of AT&T's witness Mr. McPhee to be fundamentally inconsistent with AT&T's position that the FCC has exclusive jurisdiction over the AT&T Merger Commitments. ... Either the FCC has exclusive jurisdiction over the Merger Commitments or it does not, and AT&T's own witness conceded during the hearing that state commissions would have jurisdiction over a given AT&T Merger Commitment under certain circumstances").

[73] *Id.* at p. 5 – 7.

This Commission is not alone in finding that it has concurrent jurisdiction over the Merger Commitments. The state Commissions in Kentucky[74], Tennessee[75] and Ohio[76] have each clearly held that concurrent state jurisdiction exists over the Merger Commitments.

For the reasons already extensively briefed by Sprint in Docket No. 2007-215-C and Nextel in these consolidated documents, and the Commission's finding of concurrent jurisdiction in Docket No. 2007-215-C (and shared by several state Commissions), the Commission also clearly has jurisdiction over Nextel's adoption of the Sprint ICA pursuant to Merger Commitment 7.1.

2) Neither the known purpose for, nor the express language of, Merger Commitment 7.1 supports rewriting the Commitment to impose a previously unstated "port-in" requirement.

Without citation to any authority, AT&T witness Ferguson asserts that: a) Merger Condition 7.1 "applies only when a carrier wants to take an interconnection agreement from one state and operate under that agreement in a different state (which often is referred to as "porting" an agreement from one state into another state)"[77], and b) "from a layman's perspective, ... this Merger Commitment does not address the in-state adoption rights carriers already had."[78]

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[74] *See Kentucky 3-year Extension Order*; *Kentucky Adoption Order*;

[75] *See In Re: Petition of Sprint Communications Company, L.P. and Sprint Spectrum L.P. d/b/a Sprint PCS for Arbitration of the Rates Terms and Conditions of Interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee d/b/a AT&T Southeast,* "Order Denying Motions to Dismiss, Accepting Matter for Arbitration, and Appointing Pre-Arbitration Officer", TRA Docket No. 07-00132, at p. 6 (October 5, 2007) (finding, among other things, that the Authority "possesses concurrent jurisdiction with the FCC to review interconnection issues raised by the voluntary commitments") (attached hereto as **Exhibit F**).

[76] *In the Matter of the Carrier-to-Carrier Complaint and Request for Expedited Ruling of Sprint Communications Company L.P., Sprint Spectrum, L.P., Nextel West Corp., and NPCR, Inc.,* "Finding and Order", Ohio Public Utilities Commission ("PUC") Case No.07-1136-TP-CSS (Feb. 5, 2008) ("*Ohio Finding and Order*") ("we find that we have concurrent jurisdiction with the FCC over this matter and that we have authority to interpret the FCC's Merger Commitments") (attached hereto as **Exhibit G**).

[77] *Ferguson Direct*, p. 7, l. 4-7

[78] *Id.* at p. 8, l. 1 – 2.

Mr. Ferguson is apparently unfamiliar with the clearly documented concerns that were raised by the cable telephony providers. The cable telephony providers proposed Merger Condition 7.1 based in part upon their experience with AT&T's dilatory tactics regarding in-state "opt-ins", and dealings with multiple in-state AT&T entities. In an Ex Parte Presentation filed in the FCC AT&T/BellSouth merger docket, the cable telephony providers explained:

> Cable telephony providers have experienced first hand the delays and costs that can be imposed when attempting to negotiate, *or even just opt into*, interconnection agreements with the merger applicants. The combined resource imbalance created by the merger, on the heels of the AT&T/SBC merger, will fundamentally disrupt a core goal of the Communications Act, namely that entrants and incumbents would be able to negotiate and arbitrate as equals. This resource imbalance would clearly advantage AT&T because the costs of arbitration (per customer) for a cable telephone provider would far exceed any costs incurred by AT&T. As a result, any express or implicit strategy by AT&T that creates unnecessary litigation and/or arbitration costs would harm competitors far more than it would harm AT&T. *The Commission thus should consider requiring AT&T to abide by procedures that would streamline the interconnection agreement adoption process and eliminate areas of potential friction.*
>
> Specifically, we recommend that AT&T should be required to permit cable telephony providers to opt into any entire interconnection agreement, whether negotiated or arbitrated, in any state across the merged entity's footprint, subject to technical feasibility and exclusive of state-specific pricing and performance plans.
>
> ... Nor should AT&T be permitted to require competitors to enter into separate agreements for one state simply because AT&T has multiple affiliates operating *in the same state*."[79]

The cable telephony providers' comments do not contain any suggestion that Merger Condition 7.1 was limited to the adoption of an AT&T agreement that was entered into in one state being "ported into" another state.

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[79] *AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control*, Ex Parte Presentation filed by Michael Pryor, Mintz, Levin, p. 11-12, WC Docket No. 06-74 (filed September 27, 2006) (emphasis added).

When the Commission approved the merger, FCC Commissioner Copps acknowledged that: (a) concern was raised with the creation of a "consolidated entity – one owning nearly all of the telephone network in roughly half the country – using its market power to reverse the inroads that new entrants have made and, in fact, to squeeze them out of the market altogether"; (b) "[t]o mitigate this concern, the merged entity has agreed to allow the *portability of interconnection agreements and to ensure that the process of reaching such agreements is streamlined*"; and, c) that "[t]hese are important steps for fostering residential telephone competition and ensuring that this merger does not in any way retard such competition."[80] These comments were clearly in support of the cable companies' concerns and were certainly not intended in any way to interject a "port-in" requirement within Merger Condition 7.1 that would otherwise limit what the cable telephony companies had proposed.

Cognizant of the intent behind the interconnection-related Merger Commitments, and applying the plain and ordinary meaning of the words used to establish such Commitments, it cannot be disputed that:

- Nextel is within the group of "any requesting telecommunications carrier;"
- Nextel has requested the Sprint ICA;
- The Sprint ICA is within the group of "any entire effective interconnection agreement, whether negotiated or arbitrated that an AT&T/BellSouth ILEC entered into in any state in the AT&T/BellSouth 22-state ILEC operating territory," having been entered into by Sprint and AT&T in all 9 legacy BellSouth states;

[80] *Merger Order,* Concurring Statement of Commissioner Michael J. Copps at p. 172 *see also* Concurring Statement of Commissioner Johnathan S. Adelstein, *id.* at p. 178 ("I was also pleased that we require the applicants to take a number of steps – including providing interconnection agreement portability an allowing parties to extend their existing agreements – to reduce the costs of negotiating interconnection agreements.").

- The Sprint ICA already has state-specific pricing and performance plans incorporated into it by the state;

- There is no issue of technical feasibility; and,

- The Sprint ICA has already been amended to reflect changes of law, i.e. the TRRO requirements.

In order to avoid the obvious, AT&T would have this Commission re-write Merger Commitment 7.1 to include an express "port-in" requirement. While Nextel submits that AT&T's suggested revisions to Merger Commitment 7.1 are patently unwarranted, even assuming Merger Condition 7.1 were construed to include a "port-in" requirement, one cannot ignore what logically follows from the fact that the Sprint ICA is a nine-state regional agreement that was submitted to and approved by each Commission in the same form in each of the nine-legacy BellSouth states. Nextel's adoption in one BellSouth state could simply be treated as the "porting-in" of the Sprint ICA from any of the other remaining eight-legacy BellSouth states. Being the same nine-state regional ICA, each version previously filed in the adopting state already has its state-specific provisions within it, resulting in no need for it to be further "conformed" in the adopting state.

Based on the foregoing, Nextel is entitled to adopt the Sprint ICA under Merger Condition 7.1 whether it has a "port-in" requirement or not.

C. DEFERRAL TO THE FCC IS NEITHER APPROPRIATE NOR NECESSARY

If, as Nextel anticipates, AT&T urges the Commission to defer any decision to the FCC for "clarification" regarding Nextel's adoption of the Sprint ICA based on AT&T's Merger Commitment 7.1, Nextel submits that no such deferral is warranted. As recognized by the Kentucky PSC in considering and rejecting AT&T's objections to

Nextel's adoption in Kentucky, "although Nextel can adopt the Sprint ICA pursuant to the merger commitments ... Nextel can adopt the Sprint ICS pursuant to 47 U.S.C. § 252(i) independently of the merger commitments, and, therefore, any objections pertaining to adoption under the merger commitments is moot."[81]

Because Nextel can adopt the Sprint ICA pursuant to Section 252(i) of the Act without invoking Merger Commitment 7.1, there is no reason to suspend these consolidated proceedings pending resolution of any "clarification" that AT&T may seek from the FCC regarding the Merger Commitments.[82] Even with respect to consideration of Merger Commitment 7.1, in Ohio, where the Sprint and Nextel entities are "porting" the Sprint ICA from Kentucky into Ohio pursuant to Merger Commitment 7.1, the PUC recently stated:

> "Concluding that the FCC has specifically carved out a place for state jurisdiction in the enforcement of merger commitments it would be contrary to the FCC's policy aims to defer this matter to the FCC, as AT&T would urge us to do."[83]

Should AT&T urge this Commission to defer any ruling in these proceedings to the FCC, Nextel submits that there is no legal or logical reason for the result in these proceedings to be any different than the result in Kentucky. Nextel is entitled to adopt the Sprint ICA under both 47 U.S.C. § 252(i) and AT&T's Merger Commitments, and the fact that adoption is appropriate under 252(i) renders any question of deferral to the FCC moot.

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[81] *Kentucky Reconsideration Order*, at p.10-11.
[82] *Id.*
[83] *Ohio Finding and Order*, at p. 13-14.

IV. CONCLUSION

For all of the reasons stated above, Nextel is entitled to adopt the Sprint ICA under both 47 U.S.C. § 252(i) and AT&T Inc.'s Merger Commitments.

WHEREFORE, Nextel respectfully requests that the Commission:

a) Issue an Order granting approval of Nextel's adoption of the Sprint ICA and requiring AT&T to execute an appropriate adoption agreement to implement such approval;

b) Retain jurisdiction of this matter and the parties hereto as necessary to enforce Nextel's adoption of the Sprint ICA; and

c) Grant such other and further relief as the Commission deems just and proper.

Respectfully submitted this 28th day of February, 2008.

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EXHIBIT A

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF SPRINT COMMUNICATIONS COMPANY L.P. AND SPRINT SPECTRUM L.P. D/B/A SPRINT PCS FOR ARBITRATION OF RATES, TERMS AND CONDITIONS OF INTERCONNECTION WITH BELLSOUTH TELECOMMUNICATIONS, INC. D/B/A AT&T KENTUCKY D/B/A AT&T SOUTHEAST	)))))))	CASE NO. 2007-00180

O R D E R

On May 7, 2007, Sprint Communications Company L.P. and Sprint Spectrum L.P. d/b/a Sprint PCS (collectively, "Sprint") filed a petition for arbitration pursuant to 47 U.S.C. § 252(b) seeking resolution of one issue. In its petition, Sprint requests that the Commission determine the commencement date of the 3-year extension of its interconnection agreement with BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky d/b/a AT&T Southeast ("AT&T").

On June 1, 2007, AT&T filed its response to Sprint's petition. In conjunction with its answer to the petition, AT&T moved for dismissal of the commencement date issue but also submitted an additional arbitration issue to the Commission concerning the adoption of certain portions of the interconnection agreement.

The parties have participated in an informal conference, and oral arguments were held in this matter on August 23, 2007. Briefs were filed by the parties. To date, the parties have not reached an agreement on the questions presented in this arbitration. Therefore, there are 3 issues to be decided by the Commission: (1) the

commencement date for the Sprint-AT&T agreement; (2) AT&T's motion to dismiss the Sprint petition; and (3) AT&T's request that the Commission adopt portions of the agreement.

The Commission is obligated to resolve each issue that is raised within a petition for arbitration and the responses thereto. Pursuant to the schedule outlined in 47 U.S.C. § 252, the Commission's decision on these matters is due no later than September 18, 2007.

BACKGROUND

Sprint operates as a telecommunications carrier, offering both competitive local exchange carrier ("CLEC") and commercial mobile radio service ("CMRS"). AT&T serves as an incumbent local exchange carrier ("ILEC"). This background section contains details on the recent commercial history between the two carriers and a recent Federal Communications Commission ("FCC") order affecting the Sprint-AT&T interconnection relationship.

Interconnection Agreement

Sprint and AT&T previously entered into an interconnection agreement that was approved by the Commission in Case No. 2000-00480.[1] By agreement, the parties amended that agreement at various times. On July 1, 2004, Sprint sent AT&T a request for negotiation of an extension of the parties' interconnection agreement pursuant to

[1] Case No. 2000-00480, The Petition of Sprint Communications Company, L.P. for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Sections 252(b) of the Telecommunications Act of 1996. The interconnection agreement was approved by Order dated June 25, 2002.

Sections 251, 252, and 332 of the Telecommunications Act of 1996.[2] Since that date, the parties have conducted negotiations toward the goal of developing a comprehensive subsequent agreement. However, no agreement was reached prior to the expiration date of the existing contract on December 31, 2004. Pursuant to the terms of the original agreement, and to prevent the disruption of service to consumers while allowing the parties to continue negotiating the terms of a new agreement, Sprint and AT&T have operated on a month-to-month basis since January 1, 2005.

AT&T and BellSouth Corporation Merger

On December 29, 2006, the FCC approved the merger of AT&T, Inc. and BellSouth Corporation ("BellSouth").[3] AT&T and BellSouth also closed their corporate merger on December 29, 2006.[4] On March 26, 2007, the FCC issued its final Order authorizing the merger. This Order contained certain voluntary merger commitments to be followed by the new AT&T-BellSouth corporate entity.[5] As an express condition of its merger authorization, the FCC ordered that the companies comply with the conditions set out in Appendix F of the FCC Order.

After the December 29, 2006 announcement of the FCC's approval of the merger, Sprint and AT&T deliberated the impact of the merger commitments upon their

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[2] 47 U.S.C. §§ 251, 252, 332.

[3] FCC WC Docket No. 06-74, Order dated March 26, 2007.

[4] This Commission also issued an Order approving the merger of AT&T and BellSouth Corporation, pursuant to KRS 278.020. Case No. 2006-00136, Joint Application for Approval of the Indirect Transfer of Control Relating to the Merger of AT&T, Inc. and BellSouth Corporation, final Order dated July 25, 2006.

[5] FCC WC Docket 06-74, Appendix F at 147, Order dated March 26, 2007.

negotiations of their interconnection agreement. The parties agree that during the course of the deliberations, AT&T acknowledged that, pursuant to the merger commitments, Sprint could extend its current agreement for 3 years. However, despite this agreement on the right to extend the contract, the parties have not reached a consensus as to the exact date of commencing the extension.

The specific merger commitment that is the subject of Sprint's petition is titled "Reducing Transaction Costs Associated with Interconnection Agreements." Paragraph 4 of this commitment[6] states:

> 4. The AT&T/BellSouth ILECs shall permit a requesting telecommunications carrier to extend its current interconnection agreement, regardless of whether its initial term has expired, for a period of up to three years, subject to amendment to reflect prior and future changes of law. During this period, the interconnection agreement may be terminated only via the carrier's request unless terminated pursuant to the agreement's "default" provisions.[7]

On March 20, 2007, by letter, Sprint informed AT&T that it considered the merger commitment to equal AT&T's latest offer for consideration within the Sprint-AT&T current interconnection agreement negotiations. Pursuant to Merger Commitment No. 4, Sprint requested that the current month-to-month status of the interconnection agreement be converted to a 3-year term, commencing on March 20, 2007 and terminating on March 19, 2010, in addition to other terms and considerations. Although AT&T acknowledged receipt of Sprint's March 20, 2007 letter request, AT&T provided no response and did not execute the proposed amendment outlining the

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[6] Hereinafter, Paragraph 4 will be referred to as "Merger Commitment No. 4."

[7] FCC WC Docket No. 06-74, Appendix F at 150, Order dated March 26, 2007.

commencement date for the new 3-year interconnection agreement. Sprint then filed its petition for arbitration on May 7, 2007.

This matter is currently before the Commission, as the parties cannot reach an agreement as to the commencement date for the 3-year extension. AT&T has moved to dismiss the issue, arguing that this Commission is without jurisdiction to decide this matter. Additionally, AT&T has submitted a second issue for arbitration. The second issue, which AT&T contends does fall within this Commission's jurisdiction to decide, concerns the adoption of certain portions of the proposed Sprint-AT&T interconnection agreement, titled "Attachments 3A and 3B." The Commission shall first address AT&T's motion to dismiss.

MOTION TO DISMISS

In conjunction with its response to Sprint's petition, AT&T included a motion to dismiss the arbitration issue. AT&T argues that Sprint is improperly seeking to arbitrate the interpretation of a merger commitment, which lies within the exclusive jurisdiction of the FCC. AT&T contends that, since the FCC was the agency that issued the Order approving the national AT&T-BellSouth merger and issued the appendix adopting the voluntary commitments to be followed by the companies after merger, it is the only agency with the authority to "interpret, clarify, or enforce any issues involving merger conditions. . . ."[8] AT&T admits that it agreed to extend the interconnection agreement with Sprint, but claims that the merger commitment which is the subject of Sprint's

[8] AT&T's Motion to Dismiss and Answer at 3.

petition is "separate and distinct from any obligations set forth in Section 251 of the Telecommunications Act of 1996"[9] and, therefore, results in a non-arbitrable issue.

The petition, as filed by Sprint, concerns the issue of determining the commencement date for an interconnection agreement. Interconnection agreements establish the rates, terms, and conditions concerning the services and facilities to be provided between utilities operating in states such as Kentucky. This Commission is charged by statute with overseeing the rates, terms, and conditions of service provided by and between utilities operating in Kentucky.[10]

The Telecommunications Act of 1996 has been interpreted to confer upon the state commissions the authority to oversee the implementation of, and to enforce the terms of, interconnection agreements they approve.[11] 47 U.S.C. § 251 defines the specific interconnection duties of carriers. Under that statute, each carrier has the duty to interconnect directly or indirectly with the facilities or equipment of other carriers. Pursuant to 47 U.S.C. § 252, any party negotiating the terms of an interconnection agreement has the right, in the course of negotiations, to ask a state commission to mediate any differences arising during negotiations. When presented with a petition for arbitration, Section 252 requires that state commissions ensure that the resolution of disputed issues meets the requirements of Section 251, in addition to establishing rates for interconnection, services, or network elements and providing a schedule for the implementation of the terms and conditions of the agreements. Section 251(c)(2)(D)

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[9] Id.

[10] KRS 278.040.

[11] Iowa Utilities Board v. FCC, 120 F.3d 753, 804 (8th Cir. 1997).

requires an ILEC to interconnect on rates, terms, and conditions that are just, reasonable, and non-discriminatory. Section 252(b)(4)(B) gives each state commission the power to arrive at its best decision based upon the information provided during the arbitration process. The 1996 Telecommunications Act gives suitable room for the promulgation and enforcement of state regulations, orders, and requirements of state commissions as long as they do not prevent the implementation of federal statutory requirements.[12]

In its March 26, 2007 Order approving the merger between AT&T and BellSouth, the FCC made no statement or ruling that state commissions would be without jurisdiction to address interconnection agreement questions stemming from the merger commitments.[13] Therefore, both federal and state laws unequivocally empower this Commission to hear this case.[14] Laws existing at the time that an agreement is made become part of that agreement.[15]

The Commission finds that AT&T's argument that the FCC is the sole and exclusive agency with the authority to arbitrate the commencement date issue lacks merit. The Commission reviewed the FCC's Order approving merger, as well as the arguments presented by AT&T regarding the FCC's alleged jurisdiction over interconnection commencement dates. However, no argument or evidence has been

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[12] BellSouth Telecommunications, Inc. v. Cinergy Communications, Co., 297 F. Supp. 2d 946, 952 (E.D. Ky., 2003).

[13] FCC WC Docket 06-07, Order dated March 26, 2007.

[14] Pursuant to KRS Chapter 278 et seq., the Commission is vested with the authority to regulate telephone companies providing service within this state.

[15] *See generally* Whitaker v. Louisville Transit Co., 274 S.W.2d 391 (1954).

presented that is so compelling as to convince the Commission that simply because AT&T and BellSouth chose to submit voluntary commitments to the FCC in conjunction with the request for merger approval, this serves as an affirmative demonstration that the Commission would suddenly lose jurisdiction over intrastate interconnection matters, including the commencement date of an agreement. AT&T has not presented a sufficient argument or evidence to establish the presumption that a federal order was intended to supersede the exercise of power of the state. For this to be true, AT&T needed to present evidence of a clear manifestation of the FCC's intention to do so. The exercise of federal supremacy cannot be and should not be lightly presumed.[16] The FCC stated that "all conditions and commitments. . .are enforceable by the FCC."[17] However, even under the most liberal interpretation, the phrase "are enforceable" in reference to the merger commitments is not synonymous with the word "exclusive." Simply because the Commission has to refer to a federal agency's Order to resolve a dispute does not mean that the Commission is completely preempted from using its statutorily bestowed power of arbitration. The FCC may have created and issued its merger Order, but it did not restrict the rights of state commissions to review, interpret, and apply the meaning of that document.

The Commission believes it maintains concurrent jurisdiction with the FCC to resolve such post-merger or merger-related disputes, unless clearly and unequivocally told otherwise pursuant to an FCC Order or regulation. The Commission has primary

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[16] *See* BellSouth Telecommunications, Inc. v. Cinergy Communications, supra, 297 F. Supp. 2d 946 at 953.

[17] FCC WC Docket No. 06-74, supra, Appendix F at 147 (emphasis added).

jurisdiction over general issues regarding the interpretation and implementation of interconnection agreements[18] and has affirmatively maintained jurisdiction over previous arbitration matters concerning the commencement and termination dates of carrier-to-carrier contracts.[19] Therefore, the Commission finds that it has jurisdiction and it is appropriate for the Commission to review and adjudicate this petition and the issue

[18] *See* Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635, 642 (2002) and BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, Inc., 317 F. 3d 1270, 1275 (11th Cir., 2003).

[19] *See generally* Case No. 2001-00224, Petition of Brandenburg Telecom LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with Verizon South Inc. Pursuant to the Communications Act of 1934, As Amended by the Telecommunications Act of 1996, Order dated November 15, 2001; and Case No. 2004-00044, Joint Petition for Arbitration of NewSouth Communications Corp., Nuvox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC, and Xspedius Communications, LLC on Behalf of Its Operating Subsidiaries Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Lexington, LLC, and Xspedius Management Co. of Louisville, LLC of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, Order dated March 14, 2006.

contained therein.[20] For these reasons, AT&T's motion to dismiss the commencement date issue in the petition on the ground that this state lacks jurisdiction is denied.[21]

COMMENCEMENT DATE

Sprint argues that there are two potential dates the Commission could determine as the date by which the 3-year extension of the current interconnection agreement would commence. Sprint first proposes March 20, 2007 as a potential commencement date, as it is the date on which Sprint notified AT&T in writing that the merger commitments, as outlined in the FCC's merger approval Order, qualified as AT&T's most recent offer for consideration within the parties' negotiations to extend the current interconnection agreement.[22] As stated previously in this Order, although AT&T acknowledged receipt of this letter, it provided no response by the due date outlined in the letter. In the alternative, Sprint also proposes a commencement date of December

[20] Specifically, the Commission has previously retained jurisdiction to determine the termination date of an interconnection agreement. *See* Case No. 1996-00478, Petition by AT&T Communications of the South Central States, Inc. for Arbitration of Certain Terms and Conditions of a Proposed Agreement with GTE South Incorporated Concerning Interconnection and Resale Under the Telecommunications Act of 1996, Order dated February 14, 1997.

[21] The case currently before the Commission is one of 9 identical actions that have been filed by Sprint against AT&T in every state within the former BellSouth service territory. The actions are identical and concern exactly the same issues that are presented in this action. On August 10, 2007, Commission Staff for the Louisiana PSC moved to hold Sprint's petition in abeyance. Louisiana Docket No. U-30179. If the motion is granted by their PSC, the Louisiana staff intends to seek a declaratory ruling from the FCC to clarify when the 3-year period for interconnection agreements was intended to commence. *See* Letter from AT&T to Beth O'Donnell, August 17, 2007, and letter from Sprint to Beth O'Donnell, August 22, 2007. As of the date of this Order, this Commission is not aware if the Louisiana petition has been filed with the FCC or the likely date the FCC would issue a ruling after the petition is filed. This Commission shall go forward in ruling upon the issues that have been presented before it in this matter.

[22] Petition for Arbitration at 6.

29, 2006, which is the date of the AT&T-BellSouth merger and the effective date of the FCC merger Order and merger commitments.[23] Sprint contends this date is the absolute earliest date by which the commencement of the 3-year extension could occur.[24]

AT&T's primary argument in regard to this petition issue is that the Commission lacks the jurisdiction to adjudicate the commencement date issue. However, in addition to arguing for dismissal by alleging that the merger commitments are beyond the scope of an arbitration under 47 U.S.C. § 251, AT&T alternatively contends that December 31, 2004 is the only conceivable commencement date for the extension of the interconnection agreement.[25] December 31, 2004 is the date on which the most recent Sprint-AT&T agreement concluded under a fixed term and converted to a month-to-month operation.

In light of evidence and arguments presented, the Commission finds that the date of December 29, 2006 is the proper commencement date of the extension of the

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[23] Petition for Arbitration at 8, 9.

[24] *See* North Carolina Utilities Commission, Transcript of Evidence, Docket No. P-294, Sub 31, dated May 1, 2007. Pre-Filed Testimony of Felton at 16,17,18. Filed in the record of the Commission on August 22, 2007. By agreement, Sprint and AT&T filed copies of the transcript of the hearing and portions of the record, as filed in the arbitration matter before the North Carolina Commission. As stated previously, this arbitration petition is one of 9 identical cases filed by Sprint against AT&T before every state commission within the former BellSouth service territory. The Commission has given the appropriate weight to the North Carolina Commission's record, as it felt was necessary and due.

[25] AT&T's Pre-Argument Brief at 3. AT&T contends that December 31, 2004 was the amended expiration date of the last 3-year agreement between the parties. Based on this date, AT&T states that the 3-year agreement would expire on December 31, 2007.

interconnection agreement between the parties. This is the effective date of the FCC Order and the merger commitments, including Merger Commitment No. 4, which compels AT&T to extend the life of a current interconnection agreement at the request of a connecting carrier, regardless of whether the initial term has expired. In the preamble of Appendix F of the Memorandum Opinion and Order approving merger, the FCC stated:

> The Applicants have offered certain voluntary commitments, enumerated below. Because we find these commitments will serve the public interest, we accept them. Unless otherwise specified herein, the commitments described herein shall become effective on the Merger Closing Date. . . .
>
> It is not the intent of these commitments to restrict, supersede, or otherwise alter state or local jurisdiction under the Communications Act of 1934, as amended, or over the matters addressed in these commitments, or to limit state authority to adopt rules, regulations, performance monitoring programs, or other policies that are not inconsistent with these commitments.[26]

AT&T's assertion that the interconnection agreement should be extended for 3 years from the initial expiration date of December 31, 2004 is wholly inconsistent with the FCC merger commitment directive and would create an unreasonable result. The Commission finds that within the terms of its merger order, the FCC clearly contemplated situations where interconnection agreements would be extended and effective beyond the initial term of the agreement. Again, the FCC stated in Merger Commitment No. 4 that "[t]he AT&T/BellSouth ILECs shall permit a requesting telecommunications carrier to extend its current interconnection agreement, regardless of whether its initial terms has expired, for a period of up to three years, subject to amendment to reflect prior and future changes of law." AT&T and Sprint have been,

[26] FCC WC Docket No. 06-74, Appendix F, p. 147 (emphasis added).

and are currently, operating under the interconnection agreement, as amended, originally established in Case No. 2000-00480.[27] In fact, the agreement has been repeatedly amended by both parties at various times well after the initial expiration date of December 31, 2004 specified in the original agreement.[28] If this Commission followed AT&T's reasoning and chose a commencement date of December 31, 2004, this would result in the extension of the interconnection agreement being applied in a retroactive manner prior to existence of the newly merged AT&T-BellSouth entity which is the subject of the FCC order. The FCC's merger commitments in question did not exist until December 29, 2006, and its only purpose was to direct the commercial behavior, in part, of this brand new entity collectively known as "AT&T." The Commission has found no portion of the FCC's merger order dictating that it should be applied retroactively. The Commission finds that the FCC's merger order was intended to be applied on a going-forward basis so as to address competitive concerns and other commercial issues resulting from the unification of AT&T and BellSouth. It is for these reasons that the Commission finds that the date of December 29, 2006 is to serve as the date for the commencement of the extension of the AT&T-Sprint interconnection agreement.

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[27] *See* n. 1.

[28] *See* North Carolina Utilities Commission, Transcript of Evidence, Docket No. P-294 Sub 31, dated July 31, 2007. Testimony of Felton at pages 21-24. By agreement, Sprint and AT&T filed copies of the transcript of the hearing and portions of the record, as filed in the arbitration matter before the North Carolina Commission. As stated previously, this arbitration petition is one of 9 identical cases filed by Sprint against AT&T before every state commission within the former BellSouth service territory. The Commission will examine and give the appropriate weight to the North Carolina Commission's record, as it feels is necessary and due.

ATTACHMENTS 3A AND 3B

In responding to a petition for arbitration, under 47 U.S.C. § 252(b), the non-petitioning party may also provide additional information. Pursuant to this section, AT&T, in combination with its motion to dismiss the commencement date issue, responded by submitting to the Commission a request for approval of a proposed section of the Sprint-AT&T interconnection agreement.

AT&T contends that, during the course of interconnection extension negotiations with Sprint, the companies had reached a point of consensus, in principle, on every issue within the proposed agreement when Sprint allegedly withdrew from negotiations and filed the petition for arbitration.[29] AT&T argues that, prior to Sprint's withdrawal, the only issues under discussion and to be subsequently finalized were the terms to be enumerated in Attachment 3A, which concern wireless interconnection services, and Attachment 3B, which concern wireline interconnection services. AT&T is requesting that the Commission approve the adoption of these "generic" attachments"[30] so that they may be included in the General Terms and Conditions and all other attachments of the Sprint-AT&T interconnection agreement.

In response to this issue, Sprint denies that the parties reached any final agreement, in principle or otherwise, and no such agreement was ever reduced to

[29] Attached as Exhibit B to its response to the petition, AT&T provided what it categorized as the final agreement the parties had reached through negotiations for the General Terms and Conditions and attachments. *See* AT&T Answer to Petition at 10 and Exhibit B.

[30] AT&T Pre-Argument Brief at 14.

writing or signed by the parties.[31] Additionally, Sprint states that the terms outlined within Attachments 3A and 3B were not part of any discussion between the parties.[32]

The Commission finds that the generic language for Attachments 3A and 3B as proposed by AT&T should not be adopted for the extension of the Sprint-AT&T interconnection agreement. The Commission declines to approve the adoption, as there is no evidence that the parties adhered to the single most important and basic rule of contract law, which is a "meeting of the minds." As stated in previous parts of this Order, the parties are currently functioning on month-to-month contract terms and have not agreed upon final terms of the 3-year extension. Because of this fact, the Commission cannot approve the proposed Attachments 3A and 3B, as submitted by AT&T, when Sprint has not approved one word of their terms. To constitute a binding contract, or any portion thereof, the minds of the parties must meet, and one party cannot be bound to uncommunicated terms without consent.[33] For these reasons, this issue, as submitted by AT&T, is dismissed as a matter of law.

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[31] Sprint's Response to AT&T's Motion to Dismiss and Answer at 15.

[32] Sprint Pre-Argument Brief at 21.

[33] Oakwood Mobile Homes, Inc. v. Sprowls, 82 S.W.3d 193 (Ky. 2002), citing Harlan Public Service Co. v. Eastern Construction Co., 71 S.W.2d 24 (Ky. App. 1934).

CONCLUSION

The Commission, having considered the petition of Sprint, AT&T's response and motion, and the evidence of the record in this proceeding and other sufficient advice, HEREBY ORDERS that:

1. AT&T's motion to dismiss is denied.

2. The commencement date for the new Sprint-AT&T interconnection agreement is December 29, 2006 for a fixed 3-year term.

3. AT&T's petition to adopt Attachments 3A and 3B is dismissed.

4. This Order is final and appealable.

Done at Frankfort, Kentucky, this 18th day of September, 2007.

By the Commission

ATTEST:

Executive Director

EXHIBIT B

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ADOPTION BY NEXTEL WEST CORP. OF THE EXISTING INTERCONNECTION AGREEMENT BY AND BETWEEN BELLSOUTH TELECOMMUNICATIONS, INC. AND SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP, SPRINT COMMUNICATIONS COMPANY L.P., SPRINT SPECTRUM L.P.	)))))))	CASE NO. 2007-00255

O R D E R

On June 21, 2007, Nextel West Corporation ("Nextel") filed what it styled as a "notice of adoption" of the currently effective interconnection agreement between BellSouth Telecommunications, Inc. ("BellSouth") d/b/a AT&T Kentucky, Inc. ("AT&T Kentucky") and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P. ("Sprint Interconnection Agreement"). The Sprint Interconnection Agreement was dated January 1, 2001 and has been amended. Nextel asserts that it is adopting the Sprint Interconnection Agreement pursuant to a Federal Communications Commission ("FCC") order and 47 U.S.C. § 252(i). Nextel contends that the FCC order approving merger commitments between BellSouth and AT&T Corporation authorizes this adoption.[1] Merger Commitment No. 1 of that order states that AT&T/BellSouth incumbent local exchange carriers ("ILECs") shall make available to any requesting telecommunications carrier

[1] FCC WC Docket No. 06-74, Appendix F, Order dated March 26, 2007.

any entire effective interconnection agreement, whether negotiated or arbitrated, that an AT&T/BellSouth ILEC entered into in any state in the AT&T/BellSouth 22-state ILEC operating territory.

Based on this merger commitment and on 47 U.S.C. § 252(i), Nextel requests to adopt the Sprint Interconnection Agreement initially approved by the Commission in Case No. 2000-00480[2] in its entirety and as amended. The agreement which Nextel seeks to adopt was arbitrated pursuant to 47 U.S.C. §§ 251 and 252.

On July 5, 2007, AT&T Kentucky submitted an objection to Nextel's notice of adoption and submitted a motion to dismiss this proceeding. AT&T Kentucky claimed that the Commission has no jurisdiction over matters that arose from its merger commitments. For reasons set forth in the Commission's September 18, 2007 Order in Case No. 2007-00180,[3] the Commission finds that AT&T's motion must be denied.

The Sprint Interconnection Agreement has been extended for 3 additional years pursuant to Merger Commitment No. 4, agreed upon by AT&T and BellSouth in the FCC merger proceeding. In an Order dated September 18, 2007, this Commission determined that the agreement in question is extended for 3 years from the date of the AT&T/BellSouth merger, December 29, 2006. Thus, the term of the agreement which

[2] Case No. 2000-00480, The Petition of Sprint Communications Company, L.P. for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Sections 252(b) of the Telecommunications Act of 1996.

[3] Case No. 2007-00180, Petition of Sprint Communications Company L.P. and Sprint Spectrum L.P. d/b/a Sprint PCS for Arbitration of Rates, Terms and Conditions of Interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky d/b/a AT&T Southeast.

Nextel seeks to adopt extends to December 29, 2009. The Commission finds that there is a reasonable time left to this agreement, making its adoption lawful.

The Commission, having been otherwise sufficiently advised, HEREBY ORDERS that:

1. The request of Nextel to adopt the currently effective Sprint Interconnection Agreement is granted, effective the date of this Order.

2. AT&T Kentucky's motion to dismiss Nextel's adoption petition is hereby denied.

3. Within 20 days of the date of this Order, Nextel and AT&T Kentucky shall submit their executed adoption of the Sprint Interconnection Agreement.

4. This Order is final and appealable.

Done at Frankfort, Kentucky, this 18th day of December, 2007.

By the Commission

ATTEST:

Executive Director

EXHIBIT C

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ADOPTION BY NEXTEL WEST CORP. OF THE EXISTING INTERCONNECTION AGREEMENT BY AND BETWEEN BELLSOUTH TELECOMMUNICATIONS, INC. AND SPRINT COMMUNICATIONS COMPANY LIMITED PARTNERSHIP, SPRINT COMMUNICATIONS COMPANY L.P., SPRINT SPECTRUM L.P.	)))))))	CASE NO. 2007-00255

O R D E R

On December 21, 2007, BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky ("AT&T Kentucky")[1] filed a motion to reconsider the Commission's final Order entered on December 18, 2007. As grounds for its motion, AT&T Kentucky states that because the Commission's Order "not only denied the Motion to Dismiss filed by AT&T Kentucky. . .but also granted the adoption by Nextel West Corp. ["Nextel"][2] of the interconnection agreement. . .,"[3] the Order is procedurally flawed. AT&T Kentucky asserts that "[r]esolution of AT&T Kentucky's Motion to Dismiss was a threshold matter in this Docket, and did not address the underlying substantive issues."[4] AT&T argues

[1] AT&T Kentucky is an incumbent local exchange carrier ("ILEC") and provides local exchange service in large portions of Kentucky.

[2] Nextel is a commercial mobile radio service ("CMRS") and is licensed to provide wireless service in Kentucky

[3] AT&T Kentucky's Motion for Reconsideration at 1.

[4] Id.

that should the Commission not dismiss the case for lack of jurisdiction, "proper resolution requires a hearing on the merits and AT&T [sic] should not be precluded from bringing its case-in-chief to the Commission for final resolution."[5] On January 10, 2008, the Commission issued an Order stating that AT&T Kentucky's motion for reconsideration is granted for the purpose of allowing the Commission additional time in which to address the parties' arguments. As discussed below, the Commission finds that AT&T Kentucky's motion for reconsideration and its motion for a procedural schedule should be denied.

PROCEDURAL BACKGROUND

On June 21, 2007, Nextel filed with the Commission a notice of adoption of the interconnection agreement ("Sprint ICA") between BellSouth Telecommunications, Inc. and Sprint Communications Company Limited Partnership, Sprint Communications Company L.P., Sprint Spectrum L.P. ("Sprint"). In the notice of adoption, Nextel asserted that it was exercising its right pursuant to Merger Commitments 1 and 2 of the Federal Communications Commission's ("FCC") merger proceeding[6] between AT&T and BellSouth as well as under 47 U.S.C. § 251(i). At the time Nextel filed its notice with the Commission, Sprint and AT&T Kentucky were in the middle of a dispute

[5] Id. at 2.

[6] In the Matter of AT&T Inc. and BellSouth Corporation Application to Transfer of Control, FCC WC Docket No. 06-74, Appendix F, Order dated March 26, 2007 ("Merger").

regarding the effective date of the Sprint ICA and the effect of the merger commitments on the effective date.[7]

On July 3, 2007, AT&T Kentucky filed with the Commission an objection to the notice of adoption of the interconnection agreement and moved the Commission to dismiss the complaint. As grounds for its motion to dismiss, AT&T Kentucky argued that: (1) the Commission did not have the authority to interpret and enforce the AT&T merger commitments; (2) Nextel was attempting to adopt an expired agreement and, therefore, did not satisfy the timing requirements of 47 C.F.R. § 59.801; and (3) the notice of adoption was premature because Nextel had failed to abide by the dispute resolutions provisions of its then existing interconnection agreement with AT&T Kentucky.

On September 18, 2007, while this case was still pending, the Commission entered an Order in Case No. 2007-00180. The primary issues in Case No. 2007-00180 were whether or not the Commission had the authority to interpret and apply merger commitments from the FCC's merger proceeding to disputes involving interconnection agreements in Kentucky and, if so, what was the effective date of the Sprint ICA. AT&T Kentucky argued that the Commission lacked the jurisdiction to enforce merger commitments (just as it does in the case at bar). The Commission found that it had the authority to resolve post-merger or merger-related disputes and then found that the Sprint ICA had an effective date of December 29, 2006.

[7] Case No. 2007-00180, Petition of Sprint Communications Company L.P. and Sprint Spectrum L.P. d/b/a Sprint PCS for Arbitration of Rates, Terms and Conditions of Interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky d/b/a AT&T Southeast (Ky. PSC Sep. 18, 2007).

On December 18, 2007, the Commission issued an Order in the case at bar. In the Order, the Commission, citing its rationale in Case No. 2007-00180, found that "[f]or reasons set forth in the Commission's September 18, 2007 Order in Case No. 2007-00180, the Commission finds that AT&T's motion must be denied."[8] The Commission found that, because of its decision in Case No 2007-00180, the Sprint ICA extended to December 29, 2009 and a reasonable time remained for Nextel to adopt the agreement. The Commission granted Nextel's request to adopt the Sprint ICA, denied AT&T Kentucky's motion to dismiss, and ordered the parties, within 20 days of the date of the Order, to submit their executed adoption of the Sprint ICA.

On December 21, 2007, AT&T Kentucky filed its motion for reconsideration. Nextel filed its response to AT&T Kentucky's motion for reconsideration on January 3, 2008. On January 10, 2008, the Commission entered an Order granting AT&T Kentucky's motion for reconsideration "for the purpose of allowing the Commission additional time in which to address the parties' arguments."[9] On January 24, 2008, AT&T Kentucky submitted a filing titled "AT&T Kentucky's Brief in Support of Request for Procedural Schedule and Hearing." This filing contains arguments virtually identical to those AT&T Kentucky raised in its motion for reconsideration except that, for the first time, AT&T Kentucky raised the argument that the adoption might result in higher costs in its provision of the agreement.

AT&T Kentucky, in both of its motions, argues that Nextel's attempted adoption does not comply with the merger commitments and, accordingly, the adoption should be

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[8] December 18, 2007 Order at 2 (footnote omitted).

[9] January 10, 2008 Order at 2.

denied. AT&T Kentucky asserts that Merger Commitment 1 applies only "when a carrier wants to take an interconnection agreement from one state and operate under that agreement in a different state. . . ."[10] AT&T Kentucky argues that because Nextel is not seeking to adopt an interconnection agreement from a state outside of Kentucky, such an adoption was not contemplated under the merger commitment and, therefore, the Commission should deny the adoption request. AT&T Kentucky, additionally, argues that Merger Commitment 2 merely requires AT&T Kentucky, under certain conditions, not to refuse an adoption request on the ground that the interconnection agreement had not been amended to reflect changes of law. AT&T Kentucky asserts that because its objection to Nextel's adoption is not based on any change of law issues, Merger Commitment 2 is not applicable to this dispute. Therefore, AT&T Kentucky argues, because neither of the merger commitments relied upon by Nextel for adoption of the Sprint ICA is applicable, the Commission should reconsider the adoption and deny it.

Nextel first argues that its adoption of the Sprint ICA is consistent with the merger commitments. Nextel argues that it was properly "porting" the Sprint ICA from other states when it invoked Merger Commitment 1 as one of the grounds for its adoption of the Sprint ICA. Nextel asserts that, plainly put, Merger Commitment 1 gives a requesting telecommunications carrier, such as Nextel, the right to adopt any interconnection agreement in AT&T Kentucky's 22-state service area.

Nextel asserts that Merger Commitments 1 and 2 apply because: (1) Nextel is a "requesting telecommunications carrier"; (2) Nextel has requested the Sprint ICA; (3) the Sprint ICA is an interconnection agreement entered into in "any state in the

[10] Id. at 4.

AT&T/BellSouth ILEC operating territory," and Sprint and AT&T Kentucky have entered into the same agreement in BellSouth's 9 "legacy" states; (4) the Sprint ICA already has state-specific pricing and performance plans incorporated into it; (5) there are no issues of technical feasibility; and (6) the Sprint ICA has already been amended to reflect changes in law. Nextel argues that it could just as easily have adopted a similar agreement from North Carolina and "ported" it over as it could have adopted the Sprint ICA in Kentucky.

AT&T Kentucky also argues that the adoption does not comply with 47 U.S.C. § 252(i). In support of this argument, AT&T Kentucky asserts that the Sprint ICA addresses a "unique mix of wireline and wireless items, and Nextel is a solely wireless carrier"[11] and that allowing Nextel to adopt the Sprint ICA would be contrary to FCC rulings and be "internally inconsistent."[12]

AT&T Kentucky first argues that Nextel, because it is only a wireless carrier, could not avail itself of the network elements provided within the Sprint ICA because when AT&T Kentucky negotiated the Sprint ICA, it was with both Sprint's wireless and local exchange entities. AT&T Kentucky asserts that because of this "unique" mix, the Sprint ICA "reflects the outcome of negotiated gives and takes that would not have been made if the agreement addressed only wireline service or wireless service."[13] AT&T Kentucky asserts that the terms and agreements of the Sprint ICA clearly apply only to an entity that provides both wireless and wireline service. AT&T Kentucky also asserts

[11] Id. at 5.

[12] Id.

[13] Id. at 7.

that it rarely enters into an interconnection agreement addressing both wireline and wireless services.

AT&T Kentucky asserts that to allow Nextel to adopt the Sprint ICA would "disrupt the dynamics of the terms and conditions negotiated between AT&T Kentucky and the parties to the Sprint interconnection agreement and, in this case, AT&T Kentucky would lose the benefits of the bargain negotiated with those parties."[14] AT&T Kentucky, as an example, points to Attachment 3, Section 6.1.1 of the Sprint ICA, providing for "bill and keep" arrangements. AT&T Kentucky states that it never would enter a bill-and-keep arrangement "with a strictly wireless carrier such as Nextel."[15]

AT&T Kentucky also argues that granting the adoption would violate FCC rules. AT&T Kentucky lists one instance where it alleges the adoption would erroneously allow Nextel to avail itself of unbundled network elements ("UNEs"), something prohibited by the FCC to wireless carriers. AT&T Kentucky then states that this is "but one example of why granting the adoption would violate the FCC rules."[16] AT&T Kentucky asserts that there are various terms and conditions in the Sprint ICA that cannot be applied to Nextel, but it "will refrain from discussing each at length within this pleading."[17]

AT&T Kentucky argues that the agreement cannot be revised to address these issues because the FCC has prohibited the "pick and choose" adoptions of provisions of

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[14] Id. at 7-8.

[15] Id.

[16] Id. at 9.

[17] Id.

an agreement and requires a carrier to adopt "all or nothing" of the agreement.[18] AT&T Kentucky argues that allowing Nextel to adopt the Sprint ICA after revising the agreement to clarify what is applicable to Nextel would be contrary to the FCC's ruling.

In its Brief in Support of Request for Procedural Schedule and Hearing, AT&T Kentucky advances the arguments discussed above and advances one new argument. AT&T Kentucky now argues that if certain of its costs increase as a result of Nextel's adoption, the adoption would violate the FCC's rules.[19] AT&T Kentucky further asserts that the applicable regulation, 47 C.F.R. § 51.809(b), requires AT&T Kentucky to have "an opportunity to 'prove'"[20] that the adoption would result in higher costs to it and, therefore, the Commission should schedule a hearing to do just that.

Nextel claims that AT&T Kentucky's attempt to prevent the adoption of the Sprint ICA is a discriminatory practice that was expressly rejected by the FCC. Nextel argues that AT&T Kentucky cannot "avoid making an ICA available for adoption under the 'all-or-nothing' rule based on the inclusion of what the ILEC considers additional negotiated terms that cannot be 'used' by a subsequent adopting carrier."[21] Nextel argues that both 47 U.S.C. § 251(i) and 47 C.F.R. § 51.809 prohibit AT&T Kentucky from refusing to make available interconnection agreements that are in effect. Nextel argues that

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[18] See Second Report and Order, In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 19 F.C.C.R. 13494 at Section 1 (July 13, 2004) ("Second Report and Order").

[19] AT&T Kentucky's Brief in Support of Request for Procedural Schedule and Hearing at 8-9.

[20] Id. at 9.

[21] Nextel's Response to AT&T Kentucky's Motion for Reconsideration at 11.

47 C.F.R. § 51.809 specifically prohibits an ILEC from limiting the availability of the agreement "only to those requesting carriers serving a comparable class of subscribers or providing the same service. . . ."[22]

Nextel also asserts that adoption of the Sprint ICA is not barred by either 47 C.F.R. § 51.809(b)(1) or (2) because AT&T Kentucky did not initially argue that the costs of providing the services in the Sprint ICA to Nextel are higher than the cost of providing the same services to Sprint and still does not argue that the interconnection is technically infeasible.

Nextel argues that the FCC, in adopting the "all-or-nothing" rule, was attempting to protect carriers such as Nextel. Moreover, Nextel argues that the "all-or-nothing" rule specifically prohibits AT&T Kentucky's refusal to allow the agreement to be adopted. Additionally, under the "all-or-nothing" rule, it is Nextel, not AT&T Kentucky, that gets to decide what portions of the Sprint ICA are applicable.

Nextel notes that the Sprint ICA allows either Sprint entity to opt out of the agreement, while the other entity can still operate under the Sprint ICA. Nextel also notes that, referencing AT&T Kentucky's concern that Nextel could obtain UNEs under the Sprint ICA, the Sprint ICA specifically provides that Sprint "shall not obtain a Network Element for the exclusive provision of mobile wireless services. . . ."[23]

Nextel also argues that the Commission should strike AT&T Kentucky's brief in support of its hearing request because no procedure allows for the filing of such a document. Nextel argues that the brief is merely a rehash of AT&T Kentucky's previous

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[22] Id. at 12, quoting 47 C.F.R. § 51.809.

[23] Id. at 19, quoting 9th Amendment, Attachment 2, Section 1.5 of the Sprint ICA.

arguments and the only purpose for the filing is to interject "confusion and delay"[24] into this proceeding. Nextel also objects to AT&T Kentucky's filing of Additional Supplemental Authority, claiming that it is merely devised to create further delay.

DISCUSSION

The adoption of an existing interconnection agreement, under most circumstances, is a straightforward and quick proceeding. At the time Nextel filed its notice of adoption of the Sprint ICA, the status and effective date of the Sprint ICA were not known, and that impeded the typically automatic adoption of an interconnection. However, as discussed below and in the Commission's December 18, 2007 Order, upon resolution of the status of the Sprint ICA, any existing obstacles to its adoption were removed.

JURISDICTION OVER MERGER COMMITMENTS

The Commission found in its December 18, 2007 Order that by the reasoning in its previous decision in Case No. 2007-00180, the Commission had jurisdiction to interpret and apply merger commitments and adjudicate disputes arising out of the commitments. We find the reasoning in Case No. 2007-00180 still persuasive and incorporate by reference our reasoning in that case regarding our jurisdiction over disputes arising from the merger and merger commitments. Although Nextel can adopt the Sprint ICA pursuant to the merger commitments, as discussed below, Nextel can adopt the Sprint ICA pursuant to 47 U.S.C. § 252(i), independently of the merger commitments, and, therefore, any objections pertaining to adoption under the merger

[24] Nextel's Response and Motion to Strike AT&T Kentucky's Brief in Support of Request for Procedural Schedule and Hearing at 1.

commitments is moot. Moreover, because, as discussed below, we find that Nextel may adopt the agreement pursuant to 47 U.S.C. § 252(i) and 47 C.F.R. § 51.809, and need not invoke the merger commitments, we find no reason to suspend this proceeding pending resolution of AT&T Kentucky's recent petition to the FCC requesting clarification regarding the merger commitments.[25]

THE SPRINT ICA IS ADOPTABLE UNDER
47 U.S.C. § 252(i) AND 47 C.F.R. § 51.809.

The Commission, as noted in its December 18, 2007 Order, had found in Case No. 2007-00180 that the Sprint ICA was extended by 3 years from December 29, 2006. When Nextel originally filed its petition for adoption on June 21, 2007, it relied, in part, on its rights "pursuant to the Federal Communications Commission approved Merger Commitments Nos. 1 and 2. . .and 47 U.S.C. § 252(i)."[26] At the time of the filing of the notice of adoption, however, the status of the Sprint ICA was unclear, as the Commission had not ruled on that matter in Case No. 2007-00180. The Commission has since resolved these issues, and the Sprint ICA is effective and adoptable under 47 U.S.C. § 252(i).

[25] AT&T ILECs' Petition for Declaratory Ruling That Sprint Nextel Corporation, Its Affiliates, and Other Requesting Carriers May Not Impose a Bill-and-Keep Arrangement of a Facility Pricing Arrangement Under the Commitments Approved By the Commission in Approving the AT&T-BellSouth Merger. WC Docket No. _____. (Filed February 5, 2008.) Similarly, we find AT&T Kentucky's February 13, 2008 letter to the Commission's Executive Director to be equally unpersuasive. In the letter, AT&T Kentucky urges the Commission to hold this proceeding in abeyance pending the outcome of its petition to the FCC. As discussed herein, 47 U.S.C. § 251(i) provides an independent basis for the adoption of the Agreement, and the FCC's ruling will not affect our decision.

[26] Nextel's Notice of Adoption of Interconnection Agreement at 1.

47 U.S.C. § 252(i) and 47 C.F.R. § 51.809 govern a telecommunications carrier's adoption of an existing interconnection agreement between an ILEC and a non-ILEC.

47 U.S.C. § 252(i) provides:

> A local exchange carrier shall make available any interconnection, service or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

47 C.F.R. § 51.809 provides that:

> (a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any agreement in its entirety to which the incumbent LEC is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms and conditions as those provided in the agreement. An incumbent LEC may not limit the availability of any agreement only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e. local, access, or interexchange) as the original party to the agreement.
>
> (b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:
>
> > 1) the costs of providing a particular agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or
> >
> > 2) the provision of a particular agreement to the requesting carrier is not technically feasible.
>
> (c) Individual agreements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under section 252(h) of the Act.

The method for adopting an existing interconnection agreement is simple and expedient. 47 C.F.R. § 51.809 contains the only prohibitions by which an ILEC could refuse adoption of an interconnection agreement. Here, AT&T Kentucky did not allege (until its brief in support of request for a procedural schedule) that providing the Sprint ICA to Nextel would cost it more than offering the same ICA to Sprint, nor did AT&T Kentucky allege that providing the Sprint ICA to Nextel is technically infeasible. AT&T Kentucky argues that providing the Sprint ICA to Nextel results in AT&T Kentucky not being able to negotiate possible higher prices for services than it charges to Sprint Wireless. However, this argument is a far cry from alleging that providing the Sprint ICA to Nextel would cost it more than providing it to Sprint Wireless. In fact, AT&T Kentucky's argument is antithetical to the very purpose of 47 U.S.C. § 252(i), which is to allow telecommunications providers to enter into interconnection agreements on the same footing as each other. The FCC, in promulgating the "all-or-nothing" rule, clearly recognized that it would prohibit this type of discrimination:

> We conclude that under an all-or-nothing rule, requesting carriers will be protected from discrimination, as intended by section 252(i). Specifically, an incumbent LEC will not be able to reach a discriminatory agreement for interconnection, services or network elements with a particular carrier without making that agreement in its entirety available to other requesting carriers. If the agreement includes terms that materially benefit the preferred carrier, other requesting carriers will likely have an incentive to adopt that agreement to gain benefit of the incumbent LEC's discriminatory bargain. Because the agreements will be available on the same terms and conditions to requesting carriers, the all-or-nothing rule should effectively deter incumbent LECs from engaging in such discrimination.[27]

[27] Second Report and Order at ¶ 19.

By allowing this sort of adoption, the FCC and the 1996 Telecommunications Act ensure that an ILEC, such as AT&T Kentucky, cannot play favorites in a market and determine which businesses succeed and which fail by offering more advantageous terms to one party and lesser terms to another. If AT&T Kentucky can prevent Nextel, or any requesting carrier, from adopting the Sprint ICA or any other interconnection agreement by simply asserting that some of the provisions of the interconnection agreement cannot apply to the requesting carrier, then the very purpose of the all-or-nothing rule is thwarted. Most requesting carriers' business plans or structures differ from one another, and, therefore, it would be difficult to comprehend a situation in which any requesting carrier could adopt an interconnection agreement and have all the provisions apply to it. If AT&T Kentucky's argument is to be believed, then it would result in changing almost every adoption proceeding into an arbitration.

Because the Sprint ICA is effective, Nextel's rights under 47 U.S.C. § 251(i) and 47 C.F.R § 51.809 are sufficient, by themselves, to allow it to adopt the Sprint ICA. If Nextel had not filed its notice of adoption on June 21, 2007, and were to file it today, it would only have to invoke its rights under 47 U.S.C. § 252(i) to adopt the agreement and need not rely on any merger commitments.

AT&T Kentucky states that it has been denied its opportunity to present its substantive case, but does not give a very detailed discussion of what evidence it would present at hearing, nor how the evidence would prove to the Commission that the Sprint ICA would not have to be made available to Nextel for adoption. However, as discussed above, it can only refuse to make available an interconnection agreement if it can convince the Commission that one of two situations exists. Prior to its January 24,

2008 filing, AT&T Kentucky did not allege that it intended to attempt to prove that either of those two situations exist and, therefore, no evidence it presented, or even offered to present prior to January 24, 2008, could have lead the Commission to deny the adoption.

47 C.F.R. § 51.809(a) requires that an incumbent LEC shall make available "without unreasonable delay" any agreement to a requesting carrier. Although no law is directly on point regarding what constitutes an "unreasonable delay" in this context, we find that raising an objection pursuant to 47 C.F.R. § 51.809 to a petition for adoption of an interconnection agreement over 7 months after the petition was filed is unreasonable delay. AT&T Kentucky raised numerous objections to the petition for adoption in both its original objection to the petition, filed on July 3, 2007, and in its petition for reconsideration filed on December 24, 2007. As discussed above, however, an ILEC can only deny adoption of an interconnection agreement if an ILEC can prove one of two situations exists. AT&T Kentucky, until the eleventh hour, did not even raise the specter of any such objections, objecting only on grounds not contemplated in 47 C.F.R. § 51.809(b).

47 C.F.R. § 51.809(b)(1) does provide that an ILEC can refuse the adoption of an interconnection agreement if it can prove to the state commission that the cost of providing the interconnection to the requesting carrier exceeds that of providing it to the original negotiating carrier. This right of refusal cannot be limitless; otherwise, an ILEC could seek to get out from under any interconnection agreement at any time a cost allegedly rises, even after the agreement has been adopted. Here, AT&T Kentucky not only files an untimely request arguing about potential raised costs, but its supposition

that entering into the interconnection agreement would produce higher costs is merely hypothetical. AT&T Kentucky has raised no colorable argument or proof for the existence of different costs.

To the Commission's knowledge, since the enactment of the 1996 Telecommunications Act, no ILEC has objected to the adoption in Kentucky of an interconnection agreement based on the exception found in 47 C.F.R. § 51.809(b)(1). Therefore, AT&T Kentucky's objection is a matter of first impression to the Commission and is a matter of uncharted procedural territory. However, we find that the objection is raised untimely, and moreover, even if it were timely raised, it is not specific enough to establish a colorable claim, much less warrant a hearing. If the Commission were to grant AT&T Kentucky's request for a hearing,[28] at the minimum this proceeding would drag out for another 3 months, which would result in an application for an adoption of an interconnection agreement taking over 10 months to resolve. This would be an unreasonable result. In the future, AT&T Kentucky, or any carrier raising an objection under 47 C.F.R. § 51.809(b) or (c) should raise such objections ex ante, upon the filing of the notice of adoption, and not 7 months after the initial filing. Conceivably, if this is not done, a carrier could continue to raise objections at any time during an adoption

[28] Requests for a hearing made pursuant to 807 KAR 5:001, Section 4(1)(b) are not granted automatically. 807 KAR 5:001, Section 4(1) provides that "[e]xcept as otherwise determined in specific cases," the Commission shall grant a hearing upon application for a hearing or in the event that a defendant has not satisfied a complaint. AT&T Kentucky's request for a hearing is one of the "specific cases" in which the Commission has determined that a hearing should not be held.

proceeding, delaying the adoption until the adoption could be denied pursuant to 47 C.F.R. § 51.809(c).[29]

CONCLUSION

The adoption of an interconnection agreement pursuant to 47 U.S.C. § 252(i) generally is a straightforward procedure and should occur without much delay unless adoption of the agreement falls under the exceptions in 47 C.F.R. § 51.809. These exceptions must be raised as early as practicably possible in a contested proceeding. The practical effect of AT&T Kentucky's untimely and incomplete objections is to attempt to turn a simple adoption proceeding into an arbitration proceeding, possibly exceeding over a year in length, a result that could have been avoided had AT&T Kentucky raised its objections when the petition was filed. Such a result is not only unfair, but it is also prohibited, as it is provided for in neither law nor regulation. Had AT&T Kentucky raised its objections under 47 C.F.R. § 51.809 when the petition was filed, the Commission could have addressed all objections to the petition at the same time and this proceeding would already be complete.

IT IS THEREFORE ORDERED that:

1. AT&T Kentucky's Motion for Reconsideration is denied.

2. AT&T Kentucky's Request for Procedural Schedule and Hearing is denied.

[29] We do not agree with Nextel's assertion in its response to AT&T Kentucky's supplemental submission that AT&T Kentucky's petition with the FCC is made in bad faith or to cause intentional delay in resolution of this proceeding. However, such a filing is a clear example of how an ILEC could continually raise objections to an adoption, stringing the proceeding out for months, if not years. Any objections must be raised ex ante, not post hoc.

3. Within 20 days of the date of this Order, Nextel and AT&T Kentucky shall submit their executed adoption of the Sprint ICA.

4. This is a final and appealable Order.

Done at Frankfort, Kentucky, this 18th day of February, 2008.

By the Commission

ATTEST:

Executive Director

EXHIBIT D

BELLSOUTH

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May 11, 2004

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, TW-A325
Washington, DC 20554

Re: Pick & Choose NPRM; CC Dkts 01-338, 96-98, and 98-147; Review of Sec. 251 Unbundling obligations of Incumbent Local Exchange Carriers

Dear Ms. Dortch,

BellSouth is submitting for the record in the above proceedings the attached affidavit of Jerry D. Hendrix, Assistant Vice President-Interconnection Services Marketing for BellSouth. Mr. Hendrix describes in detail how the FCC's current pick and choose rules affect interconnection negotiations in inefficient and non-productive ways.

This notice is being filed pursuant to Sec. 1.1206(b)(2) of the Commission's rules. If you have any questions regarding this filing please do not hesitate to contact me.

Sincerely,

Mary L. Henze

Mary L. Henze

cc: J. Minkoff
C. Shewman

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act Of 1996	)	CC Docket No. 96-98
	)	
	)	
Deployment of Wireline Services of Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	

AFFIDAVIT OF JERRY D. HENDRIX
ON BEHALF OF BELLSOUTH TELECOMMUNICATIONS INC. ("BELLSOUTH")

The undersigned being of lawful age and duly sworn, does hereby state as follows:

QUALIFICATIONS

1. My name is Jerry D. Hendrix. My business address is 675 West Peachtree Street, Atlanta, Georgia 30375. My title is Assistant Vice President - Interconnection Services Marketing for BellSouth. I am responsible for overseeing the negotiation of Interconnection Agreements between BellSouth and Competitive Local Exchange Carriers ("CLECs"). Prior to assuming my present position, I held various positions in the Network Distribution Department and then joined the BellSouth Headquarters Pricing and Regulatory Organizations. I have been employed with BellSouth since 1979.

PURPOSE OF AFFIDAVIT

2. The purpose of this affidavit is to follow up on questions raised by the Commission during a recent BellSouth *ex parte* presentation, notice of which was subsequently filed in this proceeding, Letter from Mary L. Henze to Marlene Dortch (April 27, 2004), and to specifically provide additional record evidence that the current pick and choose rules affect interconnection negotiations in inefficient and non-productive ways.

THE PICK AND CHOOSE RULES AFFECT INTERCONNECTION NEGOTIATIONS IN INEFFICIENT AND NON-PRODUCTIVE WAYS:

3. For example, in an effort to incorporate into its existing Interconnection Agreements ("IAs") the changes of law that resulted from the FCC's *Triennial Review Order* ("*TRO*"), BellSouth forwarded to each CLEC an amendment to its specific IA. The amendment contained all changes that the *TRO* specified, regardless of whether BellSouth viewed the change as beneficial to BellSouth or to the CLEC. Also, in the majority of its states, BellSouth filed new SGATs reflecting the current state of the law, which included the changes from the *TRO*. Before BellSouth could get the new SGAT filed in the remainder of its states, the D.C. Circuit Court of Appeals issued its Opinion and stayed significant sections of the *TRO*; therefore, BellSouth chose not to proceed with the rest of its SGAT filings until the situation stabilized. In one of the states where BellSouth filed a new SGAT, CLEC A submitted to that state commission a request to adopt only the commingling language from the SGAT. Apparently, CLEC A was attempting to avoid incorporating into its IA the remaining provisions of the *TRO*, wanting instead to incorporate into its IA only those provisions from the *TRO* that CLEC A deemed beneficial to it.

4. CLEC B, apparently in an effort to eliminate specific provisions of its negotiated IA that it now views as not being beneficial, has requested to adopt specific provisions from another carrier's agreement, even though the other carrier's agreement is actually silent on the provisions at issue. In other words, CLEC B seeks to adopt the absence of a provision.

5. A CLEC affiliate of a large, established CLEC has requested to adopt the established CLEC's IA (and, where the established CLEC has no adoptable agreement, the CLEC affiliate has requested to adopt the IA of another large, unaffiliated CLEC). The requested IAs, in most cases, were filed with and approved by the state commissions more than two years ago and do not reflect changes in law that have occurred since the agreements were signed and approved. Further, the CLEC affiliate did not request the adoption until a matter of days before the DC Circuit Court of Appeals released its March 2, 2004, Opinion regarding the TRO. The CLEC affiliate is new, has no customers, and has not even completed the certification process in at least one of BellSouth's states in which the CLEC affiliate has requested adoption of an existing IA. Nonetheless, the CLEC affiliate is requesting to adopt agreements that are no longer compliant with law, presumably in an attempt to perpetuate those portions of the agreement that it finds beneficial but that are not compliant with law. BellSouth's response to the CLEC affiliate was that it could adopt the requested IAs, but only if it agreed to amend the IAs so that they would be compliant with current law. The CLEC affiliate has, thus far, refused to amend the IAs as a condition of adoption.

6. CLEC C has a very specific business plan and customer base, and seeks certain bill and keep arrangements in connection with its interconnection with BellSouth. In this specific instance, both parties would benefit from such an arrangement. However, in other circumstances, this particular arrangement would be extremely costly to BellSouth. Rather than being able simply to agree to the arrangement with CLEC C, BellSouth's negotiator and the negotiating attorney have spent many hours consulting with BellSouth's network engineers, sales teams and billing personnel to attempt to identify and discuss all potential risks. Due to the pick and choose option, such caution is necessary in order to craft the language addressing the specific interconnection arrangement so that another CLEC cannot adopt it unless that CLEC also meets the same qualifications as CLEC C. Under the specter of pick and choose, what should be a simple negotiation that could be handled in a matter of days turns into a series of meetings with numerous people, and takes significantly longer to negotiate. Furthermore, even if BellSouth agrees to CLEC C's request and does its best to construct contract language specific to this situation, there is still the risk that CLECs who are not similarly situated will argue that they should be allowed to adopt the language, or parts thereof. Most likely, protracted litigation would occur, and if the CLEC prevailed, the result would be financial harm to BellSouth.

7. The pick and choose rules cause BellSouth to incur costs in litigation not only to defend against adoption where BellSouth believes the adopting CLEC is not similarly situated, but also to arbitrate issues with a particular carrier that could be successfully negotiated if the pick and choose rules did not exist. In a true negotiation, unrelated contract provisions left to be resolved are often "horse-traded." For example, BellSouth may agree to a CLEC's requested provision in exchange for the CLEC's agreement to an unrelated provision. Two problems can occur where BellSouth agrees to such exchanges. First, in situations where such trades are made, it is difficult, if not impossible, to track the exchanges. Thus, adopting CLECs can pick and choose certain language that includes the beneficial provision without taking the other provision that was part of the bargain (and that was beneficial to BellSouth). Second, if BellSouth insists that the CLEC also adopt the other provision that was part of the exchange, the CLEC will likely consider the other provision as being unrelated to the provision the CLEC wants to adopt, and the parties may spend months attempting to resolve the issue. Where BellSouth does not agree to the exchange for the reasons discussed above, the parties are forced to arbitrate issues that neither party truly has the inclination to fight.

8. Larger CLECs often request specialized services, such as downloads of databases, development of specialized systems or other costly endeavors, and these CLECs often want to negotiate those requests in connection with an IA. In some cases, BellSouth may be willing to agree to the request, provided that it can collect appropriate compensation. Because most of these negotiated items are not actually developed unless and until the CLEC makes a request, some such items are never actually developed and implemented. The large requesting CLEC

prefers to make a request, obtain the specialized service, system or database from BellSouth, and then reimburse BellSouth for the costs incurred. However, BellSouth cannot agree to anything other than advance payment. Otherwise, a CLEC without the financial means to pay for the development of the service could adopt the language, request development, obtain the benefit of the service and then be unable to pay for it. The large CLEC may ultimately arbitrate the issue in an effort to avoid advance payment or other terms that, for that particular CLEC and its financial capability and business plan, may actually be acceptable to BellSouth, but that BellSouth cannot agree to because the terms would then be available for adoption by other CLECs.

9. A CLEC may have a novel approach to a particular problem that BellSouth has not operationalized. That CLEC desires to include the terms and conditions of this proposed solution in its IA, and BellSouth generally would be willing to do so in order to test the concept on a small scale with that one CLEC or with a small subset of CLECs. Obviously, if the concept were successful, BellSouth would be willing to offer the same arrangement to additional CLECs. BellSouth, however, is unable to include such untested concepts in an IA, because if the solution proves to be operationally problematic, too costly or otherwise unworkable for BellSouth, adoption perpetuates the problem and causes it to grow. Thus, BellSouth generally cannot agree to incorporate innovative but untested solutions for a single carrier into an IA.

10. During 1998 and 1999, BellSouth participated in multiple arbitrations relating to the treatment of ISP-bound traffic in each of the nine states in which it provides local exchange and exchange access services. BellSouth considered attempting to settle these disputes with some CLECs with a going-forward remedy proposal. The settlement decision would have been based on each arbitrating CLEC's specific situation. Due to the uncertainty caused by the current pick and choose rules, however, BellSouth was unable to proceed in a timely manner with these settlement proposals due to the risk that CLECs that were not similarly situated to the arbitrating CLECs would attempt to obtain, and would indeed ultimately obtain, the same provisions.

11. Generally, BellSouth's Interconnection Services contract negotiators, product managers and upper management, along with BellSouth's network and billing personnel and its counsel, expend substantial resources in assessing risk of adoption, trying to develop contract language that limits adoption to similarly situated CLECs, and handling disputes involving adoption requests. Each and every issue must be considered carefully in regards to pick and choose and the potential results of including provisions in the agreement that can be adopted by other carriers. While BellSouth can attempt to craft language that would restrict the provisions only to similarly situated CLECs, such an exercise is time consuming, and often the CLEC has no inclination to expend time and resources to negotiate or agree to such language, even if the language is not problematic for the negotiating CLEC. Further, BellSouth has no assurance of prevailing at the

state commissions if the CLEC argues that it should not be required to adopt all of the restrictions along with the language it desires to adopt. The following are examples of adoption requests that BellSouth has received from multiple CLECs that impede negotiations and require a great amount of time and resources to resolve:

- Requests to adopt provisions that are beyond the scope of 252(i), such as requests to adopt dispute resolution provisions, governing law provisions, and deposit provisions that are based on the original negotiating CLEC's financial status.

- Requests to adopt specific provisions without accepting other legitimately related provisions, such as a request to adopt a "bill and keep" provision without accepting the associated network interconnection arrangements provision.

- Requests to adopt provisions to which the CLEC is not legally entitled, such as a request to adopt reciprocal compensation for ISP traffic provisions from an existing IA when the adopting CLEC did not exchange traffic with BellSouth in 2001, as is required by law to entitle that CLEC to compensation for ISP traffic.

- Requests to adopt a specific provision in order to avoid change of law provisions, such as a request to adopt specific provisions from the *TRO*, but refusing to accept all of the provisions, especially those that are more beneficial to the ILEC.

12. This concludes my affidavit.

Jerry D. Hendrix

Sworn to and subscribed before me
A Notary Public, this 10th
day of May, 2004.

Notary Public

RUDINE J. DAVIS
Notary Public, Fulton County, Georgia
My Commission Expires May 16, 2006

EXHIBIT E

8 of 30 DOCUMENTS

SAGE TELECOM, LP, Plaintiff, -vs- PUBLIC UTILITY COMMISSION OF TEXAS, Defendant.

Case No. A-04-CA-364-SS

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

2004 U.S. Dist. LEXIS 28357

October 7, 2004, Decided
October 7, 2004, Filed

COUNSEL: [*1] For SAGE TELECOM, LP, plaintiff: John K. Schwartz, John K. Arnold, Locke Liddell & Sapp L.L.P., Austin, TX.

For SOUTHWESTERN BELL TELEPHONE, L.P. dba SBC Texas, intervenor-plaintiff: Robert J. Hearon, Jr., Graves, Dougherty, Hearon & Moody, Austin, TX; Mary A. Keeney, Graves, Dougherty, Hearon Etal, Austin, TX; Jose F. Varela, Cynthia Mahowald, Southwestern Bell Telephone Co., Austin, TX.

For PUBLIC UTILITY COMMISSION OF TEXAS, defendant: Steven Baron, Attorney General's Office, Austin, TX; Kristen L. Worman, Texas Attorney General's Office, Natural Resources Division, Austin, TX.

For AT&T COMMUNICATIONS OF TEXAS, L.P., intervenor-defendant: Thomas K. Anson, Strasburger & Price, LLP, Austin, TX; Kevin K. Zarling, AT&T Communications of Texas, Austin, TX.

For BIRCH TELECOM OF TEXAS, LTD, LLP, ICG COMMUNICATIONS, XSPEDIUS COMMUNICATIONS, LLC, NII COMMUNICATIONS, LTD., INC., intervenor-defendants: Bill Magness, Casey, Gentz & Magness, LLP, Austin, TX.

JUDGES: SAM SPARKS, UNITED STATES DISTRICT JUDGE.

OPINION BY: SAM SPARKS

OPINION

ORDER

BE IT REMEMBERED that on the 10th day of September 2004, the Court called the above-styled cause for a hearing, and the parties appeared through [*2] counsel. Before the Court were Plaintiff Sage's Motion for Injunctive Relief and Motion for Summary Judgment [# 15], Intervenor SBC Texas' Application for Preliminary Injunction and Motion for Summary Judgment [# 16], the Competitive Local Exchange Carrier Intervenor-Defendants' Cross-Motion for Summary Judgment [# 23], and Defendant Public Utility Commission of Texas's Cross-Motion for Summary Judgment [925]. Having considered the motions and responses, the arguments of counsel at the hearing, and the applicable law, the Court now enters the following opinion and orders.

Background

This case involves a dispute between the Public Utility Commission of Texas ("the PUC") and two telecommunications companies, Southwestern Bell, Telephone, L.P. d/b/a SBC Texas ("SBC") and Sage Telecom, L.P. ("Sage") over the public filing requirements of the Telecommunications Act of 1996 ("the Act"). Pub. L. 104-104, 110 Stat. 56. SBC and Sage seek an injunction that would prevent the PUC from requiring them to publicly file certain provisions of an agreement under which SBC would provide Sage services and access to elements of its local telephone network. The PUC, joined by the Intervenor-Defendants, [*3] AT&T Communications of Texas, L.P., Birch Telecom of Texas, LTD, LLP, ICG Communications, nii Communications, Ltd., and Xspedius Communications, LLC, seek an order requiring SBC and Sage to publicly file the agreement in its entirety. In order to understand either party's position with respect to the public filing provisions of the Act, it is necessary to begin with a discussion of the context in which those provisions and the rest of the Act arose.

Until the time of the Act's passage, local telephone service was treated as a natural monopoly in the United States, with individual states granting franchises to local exchange carriers ("LECs"), which acted as the exclusive service providers in the regions they served. *AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 371, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999)*. The 1996 Act fundamentally altered the nature of the market by restructuring the law to encourage the development and growth of competitor local exchange carriers ("CLECs"), which now compete with the incumbent local exchange carriers ("WCs") such as SBC in the provision of local telephone services. *Id.* The Act achieved its goal of increasing market competition by imposing a **[*4]** number of duties upon ILECs, the most significant of which is the ILEC's duty to share its network with the CLECs. *Id; 47 U.S.C. § 251*. Under the Act's requirements, when a CLEC seeks to gain access to the ILEC's network, it may negotiate an "interconnection agreement" directly with the ILEC, or if private negotiations fail, either party may seek arbitration by the state commission charged with regulating local telephone service, which in Texas is the PUC. *§ 252(a), (b)*. In either case, the interconnection agreement must ultimately be publicly filed with the state commission for final approval. *§ 252(e)*.

Pursuant to the Act, Sage and SBC entered into what they have referred to as a Local Wholesale Complete Agreement ("LWC"), a voluntary agreement by which SBC will provide Sage products and services subject to the requirements of the Act, as well as certain products and services not governed by either *§ 251* or *§ 252*. Sage and SBC, concerned that portions of the LWC consist of trade secrets, have sought to gain the required PUC approval without the public filing of those portions of the agreement they contend are outside the scope of the Act's coverage.

[*5] On April 3, 2004, SBC and Sage issued a press release announcing the existence of their LWC agreement. Later that month, a number of CLECs filed a petition with the PUG seeking an order requiring Sage and SBC to publicly file the entire LWC. Sage and SBC urged the PUC not to require the public filing of the whole agreement, and on May 13, 2004, the PUC ordered Sage and SBC to file the entire LWC under seal, designating the portions of the agreement it deemed confidential, so the rest of it could be immediately publicly filed.

On May 27, 2004, the PUC declared the entire, unredacted LWC to be an interconnection agreement subject to the public filing requirement of the Act and ordered SBC and Sage to publicly file it by June 21, 2004. Instead of filing the agreement on that date, SBC and Sage filed suit in a Travis County district court challenging the PUC's order as exceeding the scope of its authority under the Act and alleging Texas trade secret law protected its confidential business information. The parties entered into an agreed temporary restraining order ("TRO") enjoining the PUC order as well as Sage and SBC's plans to begin operating under the agreement. The PUC removed **[*6]** the case to this Court on the basis of the federal question it raises with respect to the scope of the Act's coverage, and the parties subsequently agreed to extend the TRO to allow the Court time to decide the issues raised in the case. SBC and Sage seek a preliminary as well as a permanent injunction barring the PUC from enforcing its May 27, 2004 order.

In evaluating whether the PUC's interpretation of the Telecommunications Act and the FCC's regulations are correct, this Court applies a de novo standard of review. *Southwestern Bell Tel. Co. v. PUC, 208 F.3d 475, 482 (5th Cir. 2000)*. Additionally, all parties have stipulated summary judgment is appropriate in this case because there are no genuine issues of material fact and this case may be wholly decided as a matter of law. *FED. R. CIV. P. 56(c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)*.

Analysis

As an initial matter, the Court notes its agreement with the PUC's contention that it need not consider whether the items identified in the LWC are entitled to trade secret protection under Texas law. The PUC concedes it relies exclusively **[*7]** on the Act for its position the LWC must be filed in its entirety, and accordingly, were this Court to determine the PUC's interpretation of the statute was erroneous, the PUC would have no authority on which to order Sage and SBC to file the whole agreement. Likewise, SBC and Sage do not deny the obvious fact that any trade secret protections afforded by state law must give way to the requirements of federal law. Therefore, this Court's resolution of the dispute over the scope of the Act's public filing requirement entirely disposes of the case.

Section 251 establishes a number of duties on ILECs, including "the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network," *§ 251(c)(2)*; "the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications," *§ 251(b)(5)*; "the duty to negotiate in good faith in accordance with *section 252* of this title the particular terms and conditions of agreements to fulfill the duties [described in subsections (b) and (c)]," *§ 251 (c)(1)*; and "the duty to provide, to any requesting telecommunications carrier **[*8]** for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis," *§ 251(c)(3)*. [1]

1 Only certain network elements must be provided on an unbundled basis under *§ 251*. The statute gives the FCC the authority to promulgate regulations setting forth which unbundled network elements must be offered by the ILEC. *§ 251(d)*.

Section 252 sets forth the procedures by which ILECs may fulfill the duties imposed by *§ 251*. An ILEC may reach an agreement with a CLEC to fulfill its *§ 251* duties either through voluntary negotiations or, should negotiations fail, through arbitration before the State commission. *Section 252(a)(1)* describes the voluntary negotiations procedure: "Upon receiving a request for interconnection, services, or network elements pursuant to *section 251* of this title, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth **[*9]** in subsections (b) and (c) of *section 251* of this title.... The agreement ... shall be submitted to the State commission under subsection (e) of this section."

Whether the agreement is reached by means of voluntary negotiations or arbitration, it "shall be submitted for approval to the State commission." *§ 252(e)(1)*. The State commission may reject an agreement reached by means of voluntary negotiations, or any portion thereof, only if it finds the agreement or any portion "discriminates against a telecommunications carrier not a party to the agreement" or "is not consistent with the public interest, convenience, and necessity." *§ 252(e)(2)(A)*. On the other hand, the State commission may reject an agreement adopted by arbitration, or any portion thereof only "if it finds that the agreement does not meet the requirements of" *§ 251*, the regulations promulgated by the FCC pursuant to *§ 251*, or the standards in *§ 252(d)*. *§ 252(e)(2)(B)*.

Upon approval by the State commission, the agreement must be publicly filed: "A state commission shall make a copy of each agreement approved under subsection (e) ... available for public inspection and copying within 10 days after the agreement **[*10]** ... is approved." *§ 252(h)*. The public filing requirement facilitates the fulfillment of another one of the ILEC's significant duties under the Act-to make available "any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions provided in the agreement." *§ 252(i)*.

Turning now to the facts of this case, Sage and SBC do not dispute the LWC is an agreement fulfilling at least two of SBC's duties under *§ 251*: the duty "to establish reciprocal compensation arrangements" under *(b)(5)* and the duty to provide access on an unbundled basis to its local loop, which is the telephone line that runs from its central office to individual customers' premises, on an unbundled basis. *See 47 C.F.R. § 51.319(a)* (identifying the local loop as one of the unbundled network elements that must be provided under *47 U.S.C. § 251 (c)(3)*). In support of their position the LWC need not be filed despite the fact it clearly fulfills *§ 251* obligations, Sage and SBC advance two theories.

First, Sage contends the LWC need not **[*11]** be approved and filed because "the LWC Agreement did not result from a 'request' by Sage for regulated interconnection 'pursuant to *section 251*,' as required by the statute." Pl. Sage's Resp. to Cross-Mots. Summ. J. at 2 (quoting *§ 252 (a)(1)*). Sage's argument is essentially that *§ 252(a)(1)* contemplates two types of voluntarily negotiated agreements in which an ILEC would provide interconnection, services, or elements pursuant to its *§ 251* duties: those in which the CLEC consciously invokes its right to demand the ILEC's performance of its *§ 251* duties and those in which it does not. There are two problems with Sage's argument.

First, there is nothing in the statute to suggest the phrase "request ... pursuant to *section 251*" is meant to imply the existence of a threshold requirement, the satisfaction of which is necessary to trigger the operation of the statute. Although such a reading is not foreclosed by the somewhat ambiguous language of *§ 252(a)(1)*, other language in the statute makes clear such a triggering request is not a prerequisite for the operation of its filing and approval provisions. For instance, *§ 252(e)(1)* states, "any interconnection agreement adopted by **[*12]** negotiation or arbitration shall be submitted" to the State commission for approval. Although *§ 252(a)(1)* is linked to *§ 252 (e)(1)* by the language in its last sentence ("The agreement ... shall be submitted ... under subsection (e)", one cannot reasonably conclude the types of agreements subject to the State commission approval requirements of *§ 252(e)(1)* are limited to agreements made pursuant to the *§ 252(a)(1)* scheme. After all, *§ 252(e)(1)* requires the submission not only of voluntarily negotiated *§ 252(a)(1)* agreements, but also arbitrated *§ 252(b)* agreements.

The second deficiency in Sage's argument is that its proposed "triggering request" requirement would allow the policy goals of the Act to be circumvented too easily. The Act's provisions serve the goal of increasing competition by creating two mechanisms for preventing discrimination by ILECs against less favored CLECS. First, the State-commission-approval requirement provides an administrative review of interconnection agreements to ensure they do not discriminate against non-party CLECs. Second, the public-filing requirement gives

CLECs an independent opportunity to resist discrimination by allowing them to get **[*13]** the benefit of any deal procured by a favored CLEC with a request for "any interconnection, services, or network element" under a filed interconnection agreement on the same terms and conditions as the CLEC with the agreement. *§ 252(e), (i)*. If the public filing scheme could be evaded entirely by a CLEC's election not to make a formal "request ... pursuant to *section 251*," the statute would have no hope of achieving its goal of preventing discrimination against less-favored CLECs. Under Sage's interpretation of the statute, other CLECs would be able to obtain preferential treatment from ILECs with respect to *§ 251* services and network elements without fear the State commission or other CLECs would detect the parties' unlawful conduct. The CLEC would have to do nothing more than forego the triggering request and it would be free to enter secret negotiations over the federally regulated subject matter. [2]

2 SBC argues for a different threshold requirement, which would avoid this particular evasion problem *See* SBC's Resp. to Cross-Mots. Summ. J. at 2. SBC contends the "interconnection agreement" referred to in *§ 252(e)(1)* should be limited to agreements that, at least in part, address an ILEC's *§ 251(b)* and *(c)* duties. *Id.* The PUC argues for a more expansive definition of the phrase, which would include all agreements for "interconnection, services, or network elements" regardless of whether the agreement provided for the fulfillment of any *§ 251* duties. The Court need not address this dispute, however, because the parties agree the LWC does, in fact, address at least two sets of *§ 251* duties - those involving "reciprocal compensation arrangements" and those involving access to SBC's local loop.

[*14] Likely recognizing the problems with its contention the LWC does not trigger the filing and approval process at all, Sage retreats from this position in other parts of its briefing on these issues conceding, like SBC, that at least certain parts of the LWC must be approved and publicly filed under the Act. *See* Sage's Resp. to Cross-Mots. Summ. J. at 9; SBC's Resp. to Cross-Mots. Summ. J. at 6. Both SBC and Sage argue, however, the only portions of the LWC which must be publicly filed are those provisions specifically pertaining to SBC's *§ 251* duties. These arguments are ultimately unavailing.

Most importantly, SBC and Sage's position is not supported by the text of the Act itself. None of the Act's provisions suggest the filing and approval requirements apply only to select portions of an agreement reached under *§ 252(a)* and *(b)*. Rather, each of the Act's provisions refer only to the "agreement" itself, not to individual portions of an agreement. *Section 252(e)*, for example, requires the submission of "any interconnection agreement" reached by negotiation or arbitration for approval by the State commission. *Section 252(a)(1)* provides "the agreement," which is to be negotiated **[*15]** and entered "without regard to the standards set forth in *[§ 251(b)* and *(c)]*," shall be submitted to the State commission.

In contrast, *§ 252(e)(2)* gives the State commission discretion to reject a voluntarily negotiated "agreement (or any portion thereat)" upon a finding that the agreement is discriminatory or is otherwise inconsistent with the public interest, convenience, and necessity. The State commission's power to reject a portion of the agreement does not suggest, however, that its review is in any way limited to certain portions of the agreement. If Congress intended the filing and approval requirements to be limited to select "portions" of an agreement, it clearly possessed the vocabulary to say so.

Alternatively, Sage and SBC argue the provisions in the LWC addressing SBC's *§ 251* duties are also, in fact, "agreements," which in themselves may satisfy the PUC-approval and public filing requirements. In taking this position, SBC and Sage publicly filed with the PUC an amendment to their previously existing interconnection agreement setting forth those provisions of the LWC Sage and SBC deem relevant to the requirements of *§ 251*.

There are two problems with Sage's **[*16]** and SBC's position. First, *§ 252(e)(1)* plainly requires the filing of any interconnection agreement. The fact one agreement may be entirely duplicative of a subset of another agreement's provisions does not mean only one of them has to be filed. As long as both qualify as interconnection agreements within the meaning of the Act, both must be filed. Even if the Court ruled in SBC's favor that only agreements which, at least in part, address *§ 251* duties are "interconnection agreements" for the purposes of *§ 252 (e)(1)*, [3] it would not change the fact the LWC is such an agreement since it addresses the same *§ 251* duties addressed by the publicly filed amendment.

3 As noted above, the Court need not reach this issue.

Second, the publicly filed amendment, taken out of the context of the LWC, simply does not reflect the "interconnection agreement" actually reached by Sage and SBC. Rather, as the LWC demonstrates, the amendment is only one part of the total package that ultimately constitutes the entire agreement. **[*17]** Sage's Mot. Summ. J., Ex. B at § 5.5 ("The Parties have concurrently negotiated an ICA amendment(s) to effectuate certain provisions of this Agreement."). The portions of the LWC covering the matters addressed in the publicly filed

amendment are neither severable from nor immaterial to the rest of the LWC. As the PUC points out, the LWC's plain language demonstrates it is a completely integrated, non-severable agreement. It recites that both SBC and Sage agree and understand the following:

> 5.3.1 this Agreement, including LWC is offered as a complete, integrated, non-severable packaged offering only;
>
> 5.3.2 the provisions of this Agreement have been negotiated as part of an entire, indivisible agreement and integrated with each other in such a manner that each provision is material to every other provision;
>
> 5.3.3 that each and every term and condition, including pricing, of this Agreement is conditioned on, and in consideration for, every other term and condition, including pricing, in this Agreement. The Parties agree that they would not have agreed to this Agreement except for the fact that it was entered into on a 13-State basis and included the totality of terms **[*18]** and conditions, including pricing, listed herein[.]

Id. at 15.3.

It is clear from the excerpted material the publicly filed amendment, which itself excerpts the LWC's provisions regarding *§ 251* duties, is not representative of the actual agreement reached by the parties. Rather, paragraph 5.3 reveals the parties regarded every one of the LWC's terms and conditions as consideration for every other term and condition. Since, as Sage and SBC concede, some of those terms and conditions go towards the fulfillment of *§ 251* duties, every other term and condition in the LWC must be approved and filed under the Act. Each term and condition relates to SBC's provision of access to its local loop, for example, in the exact same way a cash price relates to a service under a simple cash-for-services contract.

That the LWC is a fully integrated agreement means each term of the entire agreement relates to the *§ 251* terms in more than a purely academic sense. If the parties were permitted to file for approval on only those portions of the integrated agreement they deem relevant to *§ 251* obligations, the disclosed terms of the filed sub-agreements might fundamentally misrepresent **[*19]** the negotiated understanding of what the parties agreed, for instance, during the give-and-take process of a negotiation for an integrated agreement, an ILEC might offer *§ 251* unbundled network elements at a higher or lower price depending on the price it obtained for providing non- *§ 251* services. Similarly, the parties might agree that either of them would make a balloon payment which, although not tied to the provision of any particular service or element in the comprehensive agreement, would necessarily impact the real price allocable to any one of the elements or services under the contract.

Without access to all terms and conditions, the PUC could make no adequate determination of whether the provisions fulfilling *§ 251* duties are discriminatory or otherwise not in the public interest. For example, while the stated terms of a publicly filed sub-agreement might make it appear that a CLEC is getting a merely average deal from an ILEC, an undisclosed balloon payment to the CLEC might make the deal substantially superior to the deals made available to other CLECs. Lacking knowledge of the balloon payment, neither the State commission nor the other CLECs would have any hope of **[*20]** taking enforcement action to prevent such discrimination.

The fact a filed agreement is part of a larger integrated agreement is significant for CLECs in ways that go beyond their monitoring role. *Section 252(i)* explicitly gives CLECs the right to access "any interconnection, service, or network element provided under an agreement [filed and approved under *§ 252*] upon the same terms and conditions provided in the agreement." Until recently, FCC regulations permitted a CLEC to "pick and choose" from an interconnection agreement filed and approved by the State commission "any individual interconnection, service, or network element" contained therein for inclusion in its own interconnection agreement with the ILEC. *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-338, Second Report and Order (released July 13, 2004) at P1 & n.2.

Less than three months ago, however, the FCC reversed course and promulgated a new, all-or-nothing rule, in which "a requesting carrier may only adopt an effective interconnection agreement in its entirety, taking all rates, terms, and conditions of the adopted agreement." *Id.* at P10. Significantly, **[*21]** the FCC stated its decision to abandon the pick-and-choose rule was based in large part on the fact that it served as "a disincentive to give and take in interconnection agreements." *Id.* at P11. The FCC concluded "the pick-and-choose rule 'makes interconnection agreement negotiations even more difficult and removes any incentive for ILECs to negotiate any provisions other than those necessary to implement what they are legally obligated to provide CLECs' under the Act." *Id.* at P13.

The FCC's Order demonstrates its awareness that no single term or condition of an integrated agreement can be evaluated outside the context of the entire agreement, which is why the pick-and-choose rule was an obstacle to give-and-take negotiations. In addition, the Order also demonstrates the FCC's position that an interconnection agreement available for adoption under the all-or-nothing rule may include "provisions other than those necessary to implement what [ILECs] are legally obligated to provide CLECs under the Act." The FCC, in adopting the new rule, not only proceeded on an understanding that such provisions were part of "interconnection agreements," but actively encouraged their incorporation **[*22]** as part of the give-and-take process.

Sage and SBC argue to require them to file their LWC in its entirety, despite the fact only a portion of it gives effect to SBC's *§ 251* obligations, would elevate form over substance. This contention is unfounded. Had the PUC ordered the public filing of each and every one of the LWC provisions solely on the basis they were contained together in the same document, Sage and SBC's argument might be correct. Here, however, the PUC determined all the LWC provisions were sufficiently related not by virtue of a coincidental, physical connection, but rather because of the explicit agreement reached by Sage and SBC. It was the determination of the parties themselves that each and every element of the LWC agreement was so significant that neither was willing to accept any one element without the adoption of them all.

SBC carries the form-over-substance argument one step further arguing the PUC's approach to the statute penalizes it for putting the LWC in writing and filing it. Its argument presupposes the PUC's approach would not prohibit unfiled, under-the-table agreements that integrate filed agreements containing *§ 251* obligations. This argument **[*23]** is disingenuous. Nothing in the text of the Act's filing requirements suggests the existence of an exemption for unwritten or secret agreements and nothing about the PUC's argument implies such an exemption. Moreover, SBC and Sage did not file their LWC in its entirety until the Intervenor-Defendants in this case urged the PUC to compel its filing. That they intend to keep portions of it secret is their entire basis for filing this lawsuit. However, neither the PUC's position nor the statute itself authorizes secret, unfiled agreements and those telecommunications carriers seeking to operate under them are subject to forfeiture penalties. *47 U.S.C. § 503(b); In re Qwest Corp.; Apparent Liab. for Forfeiture, Notice of Apparent Liab. for Forfeiture, 19 FCC Rcd 5169 at P16 (2004).*

SBC also argues a rule requiring it to make the terms of its entire LWC agreement with Sage available to all CLECs is problematic because there are certain terms contained in it, which for practical reasons, it could not possibly make available to all CLECs. Its argument proves too much. The obligation to make all the terms and conditions of an interconnection agreement **[*24]** to any requesting CLEC follows plainly from *§ 252(i)* and the FCC's all-or-nothing rule interpreting it. The statute imposes the obligation for the very reason that its goal is to discourage ILECs from offering more favorable terms only to certain preferred CLECs. SBC's and Sage's appeal to the need to encourage creative deal-making in the telecommunications industry simply does not show why specialized treatment for a particular CLEC such as Sage is either necessary or appropriate in light of the Act's policy favoring nondiscrimination.

In addition to the text-based and policy arguments favoring the PUC's position that the entire LWC must be filed, the Court notes its approach is in step with FCC guidance and Fifth Circuit case law. In its *Qwest Order,* although the FCC declined to create "an exhaustive, all-encompassing 'interconnection agreement' standard," it did set forth some guidelines for determining what qualifies as an "interconnection agreement" for the purposes of the filing and approval process. In re *Qwest Communications International Inc., Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual* **[*25]** *Arrangements under Section 252(a)(1), Memorandum Opinion and Order, 17 FCC Rcd 19337 at P10.* Specifically, it found "an agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation is an interconnection agreement that must be filed pursuant to *section 252(a)(1)." Id. at P8.* The FCC specifically rejected the contention "the content of interconnection agreements should be limited to the schedule of itemized charges and associated descriptions of the services to which the charges apply." *Id.*

The PUC's position also finds support in the Fifth Circuit's holding in *Coserv Ltd. Liab. Corp. v. Southwestern Bell Tel. Co., 350 F.3d 482 (5th Cir. 2003).* There, the Fifth Circuit was asked to determine the scope of issues subject to an arbitration held by a State commission under *§ 252(b)* of the Act. The court held, "where the parties have voluntarily included in negotiations issues other than those duties required of an ILEC by *§ 251(b)* and *(c)*, those issues are subject to compulsory arbitration under **[*26]** *§ 252(b)(1)*." SBC and Sage argue *Coserv* is inapplicable because it did not deal with the scope of the voluntary negotiation process, under which their LWC was formed. However, the statutory scheme, viewed on the whole, does not support distinguishing *Coserv* from this case in the way they propose. As the court there noted, the entire *§ 252* framework contemplates non- *§ 251* terms may play a role in inter-

connection agreements: "by including an open-ended voluntary negotiations provision in *§ 252(a)(1)*, Congress clearly contemplated that the sophisticated telecommunications carriers subject to the Act might choose to include other issues in their voluntary negotiations, and to link issues of reciprocal interconnection together under the *§ 252* framework." *Coserv, 350 F.3d at 487.* The arbitration provision at issue in *Coserv* is intertwined with the Act's voluntary negotiations provision since arbitration is only available after an initial request for negotiation is made, *§ 252(b)(1)*. Furthermore, because the statute makes arbitrated and negotiated agreements equally subject to the requirements for filing and commission approval, *§ 252(e)(1)*, this Court **[*27]** finds no basis on which to distinguish them for the purposes of determining the scope of the issues they may embrace.

SBC's concern that this reading of *Coserv* would subject any agreement between telecommunications carriers to commission approval is also unjustified. The Fifth Circuit made clear that in order to keep items off the table for arbitration-and under this Court's reading of *Coserv,* to keep them out of the filing and approval process-the ILEC need only refuse at the time of the initial request for negotiations under the Act to negotiate issues outside the scope of its *§ 251* duties: "An ILEC is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act when a CLEC requests negotiation pursuant to *§§ 251* and *252." Id. at 488.* However, where an ILEC makes the decision to make such non- *§ 251* terms not only part of the negotiations but also non-severable parts of the interconnection agreement which is ultimately negotiated, it and the CLEC with whom it makes the agreement must publicly file all such terms for approval by the State commission.

Conclusion

In accordance with the foregoing: **[*28]**

> IT IS ORDERED that Plaintiff Sage's Motion for Injunctive Relief and Motion for Summary Judgment [# 15] is DENIED;
>
> IT IS FURTHER ORDERED that Intervenor SBC Texas' Application for Preliminary Injunction and Motion for Summary Judgment [# 16] is DENIED;
>
> IT IS FURTHER ORDERED that Defendant Public Utility Commission of Texas's Cross-Motion for Summary Judgment [# 25] is GRANTED;
>
> IT IS FURTHER ORDERED that the Competitive Local Exchange Carrier Intervenor-Defendants' Cross-Motion for Summary Judgment [# 23] is GRANTED;
>
> IT IS FURTHER ORDERED that the Temporary Restraining Order continued by this Court in the Agreed Scheduling Order of July 2, 2004 is WITHDRAWN; and
>
> IT IS FINALLY ORDERED that all other pending motions are DISMISSED AS MOOT. [4]

4 The Court declines to order SBC and Sage to publicly file the LWC. Neither the PUC nor the Intervenor-Defendants have pointed to any authority on which the Court could order such an action, and both the FCC and the PUC have sufficient enforcement authority under the Act to compel a public filing without the intervention of this Court.

[*29] SIGNED this the 7th day of October 2004.

SAM SPARKS

UNITED STATES DISTRICT JUDGE

JUDGMENT

BE IT REMEMBERED on the 7th day of October 2004 the Court entered its order denying Southwestern Bell, Telephone, L.P.'s ("SBC") and Sage Telecom, L.P.'s ("Sage") motions for summary judgment and applications for injunctive relief against the Public Utility Commission of Texas ("the PUC") and granting the latter's motion for summary judgment. Accordingly, the Court enters the following final judgment in this case:

> IT IS ORDERED that the Temporary Restraining Order continued by this Court in the Agreed Scheduling Order of July 2, 2004 is DISSOLVED;
>
> IT IS FURTHER ORDERED that all pending motions are DISMISSED AS MOOT; and
>
> IT IS FINALLY ORDERED, ADJUDGED, and DECREED that Plaintiff Sage and Intervenor-Plaintiff SBC take nothing in this case against Defendant PUC and all costs are taxed to Sage and SBC, for which let execution issue.

SIGNED this the 7th day of October 2004.

SAM SPARKS

UNITED STATES DISTRICT JUDGE

EXHIBIT F

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

October 5, 2007

IN RE: PETITION OF SPRINT COMMUNICATIONS COMPANY L.P. AND SPRINT SPECTRUM L.P. D/B/A SPRINT PCS FOR ARBITRATION OF THE RATES TERMS AND CONDITIONS OF INTERCONNECTION WITH BELLSOUTH TELECOMMUNICATIONS, INC. D/B/A AT&T TENNESSEE D/B/A AT&T SOUTHEAST	))))))	**DOCKET NO. 07-00132**

ORDER DENYING MOTIONS TO DISMISS, ACCEPTING MATTER FOR ARBITRATION, AND APPOINTING PRE-ARBITRATION OFFICER

This matter came before Chairman Eddie Roberson, Director Sara Kyle, and Director Ron Jones of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on September 10, 2007 for consideration of the following filings: (1) *Petition of Sprint Communications Company L.P. and Sprint Spectrum L.P. d/b/a Sprint PCS for Arbitration of the Rates, Terms and Conditions of Interconnection with BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee d/b/a AT&T Southeast ("Petition")* filed on May 18, 2007; (2) *BellSouth Telecommunications, Inc., d/b/a AT&T Tennessee's Motion to Dismiss and Answer* (*"Motion"* or *"Answer"*) filed on June 12, 2007; and (3) *Sprint's Response to AT&T Tennessee's Motion to Dismiss and Answer* (*"Response"*) filed on June 19, 2007.

THE PLEADINGS

In its *Petition*, Sprint raises an issue of first impression for the Authority. Sprint asks the Authority to determine the effect on the parties' current interconnection agreement

of a voluntary commitment undertaken by AT&T as a condition of the Federal Communication Commission's ("FCC") approval of its merger with BellSouth Corporation.[1] Specifically, Sprint frames the single issue for which it seeks arbitration as: "[m]ay AT&T effectively deny Sprint's request to extend its current Interconnection Agreement for three full years from March 20, 2007 pursuant to Interconnection Merger Commitment No. 4?"[2]

In its *Motion,* AT&T requests that the Authority dismiss Sprint's *Petition* because it fails to raise a Section 251 arbitration issue. Further, AT&T maintains that the *Petition* seeks arbitration of "the interpretation of a merger commitment, which lies within the exclusive jurisdiction of the FCC."[3] In this pleading, AT&T also seeks to raise a different, unresolved issue for arbitration related to the parties' negotiations of a new interconnection agreement. The proposed issue is "[s]hould Attachments 3A and 3B . . . be incorporated into the new interconnection agreement as 'Attachment 3?'"[4]

On June 19, 2007, Sprint filed its *Response.* In its *Response,* Sprint requests the Authority deny AT&T's *Motion* in its entirety, dismiss AT&T's proposed issue, promptly accept its *Petition* for arbitration, and establish a procedural schedule.

POSITION OF THE PARTIES

Sprint

Sprint avers the interconnection agreement approved by the Authority in Docket No. 00-00691, and amended from time to time, is current. Sprint states that it requested by letter dated July 1, 2004 negotiation of a subsequent interconnection agreement, and that the parties have participated in negotiations to that end. Sprint further states that the

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[1] *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74 (Adopted December 29, 2006, Released: March 26, 2007) ("*Merger Order*").
[2] *Petition*, p.8 (May 18, 2007).
[3] *Motion*, pp.1-2 (June 12, 2007).
[4] *Motion*, p.11 (June 12, 2007).

parties' interconnection agreement converted to a month-to-month term effective January 1, 2005, and that the parties continue to operate pursuant to its terms.

Sprint points out that on December 29, 2006 the FCC approved the merger of AT&T, Inc. and BellSouth Corporation subject to certain conditions, which the merging parties voluntarily accepted. One of the accepted commitments listed in Appendix F to the *Merger Order* pertains to "Reducing Transaction Costs Associated with Interconnections Agreements." This commitment reads:

> The AT&T/BellSouth ILECs shall permit a requesting telecommunications carrier to extend its current interconnection agreement, regardless of whether its initial term has expired, for a period of up to three years, subject to amendment to reflect prior and future changes of law. During this period, the interconnection agreement may be terminated only via the carrier's request unless terminated pursuant to the agreement's default provisions.[5]

Sprint states that it advised AT&T in writing on March 20, 2007 that Sprint considers the FCC merger commitment as AT&T's "latest offer for consideration within the current 251/252 negotiations that supersede or may be viewed as an addition to any prior offers" made in the current negotiations.[6] Sprint further states that on March 21, 2007 AT&T acknowledged receipt of Sprint's proposal and denied the request for a full three year extension of the parties' interconnection agreement beginning March 21, 2007 by offering only to extend the Sprint agreement until December 31, 2007. Sprint argues that the parties agree that Sprint is allowed to extend its current month-to-month agreement but disagree regarding the commencement date from which to begin the three (3) year extension. Sprint opines that such three (3) year extension should commence from the date of Sprint's request for the extension.

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[5] *Merger Order*, Appendix F (Adopted December 29, 2006, Released: March 26, 2007).
[6] *Petition*, pp.6-7 (May 18, 2007).

Sprint opines that the commencement date of an interconnection agreement is a core Section 251 interconnection implementation issue and subject to Section 252 arbitration which is the responsibility of the Authority.

AT&T

AT&T opines that Sprint improperly seeks to arbitrate the interpretation of a merger commitment. AT&T further opines that merger commitment interpretation lies within the exclusive jurisdiction of the FCC.

AT&T also maintains that the issue as identified by Sprint is clearly not an arbitrable issue pursuant to the Federal Telecommunications Act of 1996 ("Act") and therefore, is outside the scope of a Section 251 arbitration. In AT&T's opinion, the FCC has sole jurisdiction over AT&T's merger commitments as it states in the *Merger Order* in Appendix F: "...unless otherwise expressly stated to the contrary, all conditions and commitments proposed...are enforceable by the FCC...."[7]

In the event that the Authority does not grant its motion to dismiss, AT&T requests that the Authority dismiss Sprint's issue offered for arbitration and instead adopt the issue it sets out for arbitration. AT&T asks the Authority to accept for arbitration only the issue of whether Attachments 3A and 3B, which relate to wireless interconnection services and wireline interconnection services, should be included in its proffered negotiated agreement.

Sprint's Response to AT&T's Motion

Sprint asserts AT&T's *Motion* should be denied. Sprint opines that the FCC and the Authority have concurrent jurisdiction regarding disputes pertaining to interconnection agreement related matters, including disputes over the merger commitments in the *Merger Order*. Sprint also requests that the Authority dismiss AT&T's proposed interconnection

[7] *Merger Order*, Appendix F (Adopted December 29, 2006, Released: March 26, 2007).

agreement issue because it is irrelevant and because AT&T is requesting that the Authority authorize it to breach its merger commitment.

FINDINGS AND CONCLUSIONS

AT&T's *Motion* is based on two premises: (1) the issue raised by Sprint is not a Section 251 arbitrable issue and (2) the FCC has sole jurisdiction over AT&T's merger commitments. The Tennessee Supreme Court has held that "a motion to dismiss admits the truth of all relevant and material averments contained in the complaint, but asserts that such facts do not constitute a cause of action as a matter of law."[8] Further, a motion to dismiss must be denied "unless it appears that the plaintiff can prove no set of facts in support of [its] claim that would entitle it to relief."[9]

In applying that legal framework to the instant case, the Authority must determine whether Sprint's *Petition* asserts any facts which trigger the Authority's jurisdiction under Section 252(b) of the Act to arbitrate an open issue related to the parties' interconnection agreement. When viewing the *Petition* in this light, the Authority finds that Sprint has asserted facts that "constitute a cause of action" under Section 252. Specifically, the Authority finds the following relevant facts averred in the *Petition:*

1. The parties have an existing interconnection agreement.
2. The parties entered into Sections 251-252 negotiations in order to negotiate a new interconnection agreement.
3. The *Merger Order* provided that a requesting telecommunications carrier may extend its current interconnection agreement for a period of up to three years.
4. Sprint advised AT&T that it considered the Merger Commitment to constitute an offer in its Sections 251-252 negotiations to extend the current agreement three years and accepted said offer and requested an amendment to the current agreement to convert the current month to month agreement and extend it from March 20, 2007 to March 20, 2010.

[8] *Bell v. Icard*, 986 S.W. 2d 550, 554 (Tenn. 1999).
[9] *Stein v. Davidson Hotel Co.*, 945 S.W. 2d 714, 716 (Tenn. 1997).

5. AT&T contends that any three year extension commences from December 31, 2004.[10]

The Authority finds that these averments bring into question a core issue of an interconnection agreement, i.e., the commencement and end dates of the parties' agreement. In so doing, Sprint has raised an arbitrable open issue under Section 251 and triggered the Authority's subject matter jurisdiction under Section 252(b).

AT&T's second basis for its motion to dismiss is essentially a pre-emption argument – that the FCC has sole jurisdiction over AT&T's merger commitments. The courts, the FCC, and the Authority have grappled with the hybrid jurisdictional scheme created by the Act's "cooperative federalism."[11] That the states have been given a shared role in telecommunications regulation is not in question. Consistent with the concurrent state and federal jurisdiction under the Act, the FCC's language in Appendix F explicitly recognizes that there may be instances in which states may well be faced with interpreting its *Merger Order*, and specifically, the merger commitments. Because the issue in the instant case inextricably links a Section 251 open issue with one of the interconnection merger commitments, the Authority finds that AT&T's pre-emption argument is not well-founded and that under the plain language of the *Merger Order*, which provides that nothing in the voluntary merger commitments are meant to "restrict, supercede or otherwise alter state . . . jurisdiction," the Authority possesses concurrent jurisdiction with the FCC to review interconnection issues raised by the voluntary commitments.[12]

Finally, Sprint's request for the Authority to dismiss the issue raised by AT&T is essentially a motion to dismiss and must therefore be reviewed under the same legal

[10] *Petition*, ¶¶ 7, 8, 9, 12, 14, 15 (May 18, 2007).
[11] *See In re: Docket to Establish Generic Performance Measurements, Benchmarks and Enforcement Mechanisms for BellSouth, Inc.*, TRA Docket No. 01-00193, Order, pp. 5-6 (June 28, 2002); *Michigan Bell Telephone Co. v. MCIMetro Access Transmission Services, Inc.*, 323 F.3d 348 (6th Cir. 2003).
[12] *Merger Order*, Appendix F (Adopted December 29, 2006, Released: March 26, 2007).

standard set out above for reviewing the AT&T *Motion*. The Authority finds that AT&T has, in fact, articulated an open issue which is ripe for arbitration under Section 252. Therefore, the Authority finds that Sprint has failed to meet the legal burden required to sustain its request that the Authority dismiss AT&T's issue.

At the September 10, 2007 regularly scheduled Authority Conference, the panel voted unanimously to deny AT&T's *Motion* and Sprint's request for dismissal of AT&T's issue, accept the matter for arbitration, including both the issue raised by Sprint in its *Petition* as well as the issue raised by AT&T in its *Answer,* and appoint a Pre-Arbitration Officer to prepare the matter for arbitration.

IT IS THEREFORE ORDERED THAT:

1. AT&T's *Motion to Dismiss* is denied.

2. Sprint's request to dismiss AT&T's issue is denied.

3. Both the issues raised in Sprint's *Petition* and AT&T's *Answer* are accepted for arbitration.

4. General Counsel or his designee is appointed to serve as the Pre-Arbitration Officer to prepare this matter for hearing.

Eddie Roberson, Chairman

Sara Kyle, Director

Ron Jones, Director

EXHIBIT G

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Carrier-to-Carrier Complaint and Request for Expedited Ruling of Sprint Communications Company L.P., Sprint Spectrum L.P., Nextel West Corp., and NPCR, Inc.,	)	
Complainants,	)	
v.	)	Case No. 07-1136-TP-CSS
The Ohio Bell Telephone Company dba AT&T Ohio,	)	
Respondent,	)	
Relative to the Adoption of an Interconnection Agreement.	)	

FINDING AND ORDER

The Commission finds:

(1) On October 26, 2007, Sprint Communications Company L.P. (Sprint CLEC),[1] Sprint Spectrum L.P.[2] (Sprint Spectrum), Nextel West Corp.,[3] and NPCR, Inc.[4] (collectively Sprint) filed a complaint against AT&T Ohio (AT&T). In the complaint, Sprint alleges that it wishes to adopt the interconnection agreement between, on the one hand, BellSouth Telecommunications, Inc. dba AT&T Kentucky dba AT&T Southeast and, on the other hand, Sprint CLEC and Sprint Spectrum. Sprint contends that AT&T must permit the adoption of the interconnection agreement pursuant to federal

1 Sprint CLEC is authorized to provide local and interexchange telecommunication services in Ohio under certificate number 90-9015.

2 Sprint Spectrum is an agent and general partner of WirelessCo, L.P. and SprintCom, Inc. The companies provide commercial mobile radio services in Ohio and conduct business under the name Sprint PCS.

3 Sprint states in its application that Nextel West Corp. is authorized by the Federal Communications Commission to provide wireless services in Ohio.

4 Sprint states in its application that NPCR, Inc. is authorized by the FCC to provide wireless services in Ohio.

merger commitments made by AT&T Inc. and BellSouth Corporation as approved by the FCC in *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, FCC 06-189 (released March 26, 2007) (FCC Merger Order).[5] Sprint also requests that the Commission issue an expedited ruling.

(2) Sprint alleges and AT&T agrees that, effective January 1, 2001, Sprint CLEC and Sprint PCS entered into an interconnection agreement with BellSouth Telecommunications, Inc. The agreement covered nine states, including the State of Kentucky (BellSouth ICA). The parties have amended the agreement various times subsequent to its execution.

(3) By letter dated August 21, 2007, AT&T notified Sprint that it intended to terminate its existing interconnection agreements with Sprint in various states, including Ohio. Sprint CLEC and Sprint PCS responded to the notification on August 31, 2007, and agreed to establish an arbitration window beginning on January 12, 2008. Nonetheless, Sprint alleges that it reserved the right to enforce a merger commitment that would permit it to port an interconnection agreement from another state.

(4) Sprint states that on July 10, 2007, it notified AT&T of its intent to adopt and port the BellSouth ICA to Ohio. On September 18, 2007, the Kentucky Public Service Commission issued an order extending the BellSouth ICA for a fixed three-year term

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5 There are four merger commitments. They appear in Appendix F attached to the FCC Merger Order under the title "Reducing Transaction Costs Associated with Interconnection Agreements." Merger Commitments 1 and 2 appear as follows:

Merger Commitment 1: The AT&T/BellSouth ILECs shall make available to any requesting telecommunications carrier any entire effective interconnection agreement, whether negotiated or arbitrated that an AT&T/BellSouth ILEC entered into in any state in the AT&T/BellSouth 22-state ILEC operating territory, subject to state-specific pricing and performance plans and technical feasibility, and provide, further, that an AT&T/BellSouth ILEC shall not be obligated to provide pursuant to this commitment any interconnection arrangement or UNE unless it is feasible to provide, given the technical, network, and OSS attributes and limitations in, and is consistent with the laws and regulatory requirements of, the state for which the request is made.

Merger Commitment 2: The AT&T/BellSouth ILECs shall not refuse a request by a telecommunications carrier to opt into an agreement on the ground that the agreement has not been amended to reflect changes of law, provided the requesting telecommunication carrier agrees to negotiate in good faith an amendment regarding such change of law immediately after it has opted into the agreement.

beginning on December 29, 2006.[6] On October 9, 2007, AT&T notified Sprint that the BellSouth ICA had expired and that the agreement was not eligible for adoption.

(5) Sprint states that negotiations for a new interconnection agreement with AT&T have failed. Instead of initiating an arbitration proceeding, Sprint has opted to file a carrier-to-carrier complaint. Ultimately, Sprint seeks to adopt the BellSouth ICA and port it to Ohio.

(6) Sprint states that there are no factual issues and that there is only one legal issue: whether Sprint may port the BellSouth ICA, as extended three years from December 29, 2006, into Ohio pursuant to Merger Commitment 1. Noting the absence of material factual disputes, the Commission shall forego a hearing in this matter and shall decide the issue based on the law and the arguments asserted by the parties.

(7) On November 2, 2007, AT&T filed an answer to the complaint and a separately filed motion to dismiss. In summary, AT&T argues that the Commission has no jurisdiction over the complaint. Even assuming that the Commission has jurisdiction over the complaint, AT&T contends that it would be better for the Commission to defer to the FCC. In addition, AT&T asserts that the complaint is premature. Problematic, according to AT&T, is that the interconnection agreement that Sprint seeks to port cannot be ported "as is" because the agreement requires Ohio-specific modifications. Procedurally, AT&T opposes Sprint's request for streamline treatment of the complaint. AT&T believes that the complaint is not legally eligible for streamlined treatment. Similarly, AT&T opposes Sprint's request for expedited treatment because such treatment is unavailable under the Commission's rules.

(8) Sprint filed a memorandum contra AT&T's motion to dismiss on November 19, 2007. In its memorandum contra, Sprint proclaims that the Commission has concurrent jurisdiction with the FCC and may interpret and apply federal law to resolve interconnection disputes and to enforce the merger commitments. Moreover, Sprint believes that it would be more

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6 *Petition of Sprint Communications Company L.P. and Sprint Spectrum L.P. dba Sprint PCS for Arbitration of Rates, Terms and Conditions of Interconnection with BellSouth Telecommunications, Inc. dba AT&T Kentucky dba AT&T Southeast,* Case No. 2007-00180 (Order issued September 18, 2007).

appropriate for the Commission to exercise its jurisdiction rather than defer to the FCC. Further challenging AT&T's assertions, Sprint contends that the complaint is not premature, that it may be ported "as is," and that this matter is eligible for a streamlined procedure. Sprint urges the Commission to exercise jurisdiction, deny AT&T's motion to dismiss, and order AT&T to port Sprint's Kentucky interconnection agreement.

(9) Factually, AT&T explains that in the spring of 2007 Sprint sought to extend the BellSouth ICA for three years in each of the nine states in which the BellSouth ICA had been in effect. On September 18, 2007, the Kentucky Commission granted the extension. AT&T believes that the September 18, 2007, decision is unlawful because it misinterprets Merger Commitment 4.[7] AT&T discloses that it may appeal the Kentucky Commission's September 18, 2007, ruling.[8] Thus, if the Ohio Commission were to approve Sprint's application and AT&T were to prevail in overturning the Kentucky Commission's decision, AT&T argues that it would have a basis to invalidate the BellSouth ICA through the change in law provision in the agreement.

(10) As a basis for dismissing the complaint, AT&T believes that the Kentucky Commission's September 18, 2007, decision is unlawful because it encroaches upon the exclusive jurisdiction of the FCC over the merger and the merger commitments. To support its position, AT&T points out that the FCC in its merger order did not contemplate any other forum but itself to interpret, clarify, or enforce the merger commitments. To AT&T, it makes sense that the FCC would retain exclusive jurisdiction to ensure a uniform regulatory framework without conflicting interpretations. Even if the Ohio Commission were to find that it has concurrent jurisdiction, AT&T contends that the Commission should exercise restraint to avoid conflicting results within AT&T's 22-state region.

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7 Merger Commitment 4: The AT&T/BellSouth ILECs shall permit a requesting telecommunications carrier to extend its current interconnection agreement, regardless of whether its initial term has expired, for a period of up to three years, subject to amendment to reflect prior and future changes of law. During this period, the interconnection agreement may be terminated only via the carrier's request unless terminated pursuant to the agreement's "default" provisions.

8 In its November 29, 2007, reply, AT&T noted that it has decided not to appeal the Kentucky Commission's order and that there is no further need to discuss this issue.

As additional support for its position, AT&T points out that the public service commissions in the states of Mississippi and Florida have recognized that the FCC has exclusive jurisdiction. Similarly, the states of South Carolina and Louisiana have deferred to the FCC.

(11) Disagreeing with AT&T's assertion that the FCC has exclusive jurisdiction over the enforcement of merger issues, Sprint, in its memorandum contra, points to Appendix F of the FCC Merger Order to support its contention that the Commission has concurrent jurisdiction. Focusing on language in Appendix F, Sprint highlights that the merger commitments "may" be enforced by the FCC. From this, Sprint concludes that the FCC is not the exclusive forum to enforce merger commitments. Taking into consideration other passages in Appendix F, Sprint further concludes that the FCC intended dual jurisdiction for the states and the FCC, with the FCC playing a secondary role. For statutory support, Sprint refers to Section 4905.04(B), Revised Code, and 47 U.S.C. §153[9] as grounds to support a state commission's assertion of jurisdiction.

Looking to other cases for guidance, Sprint argues that the FCC has a long-standing practice of establishing concurrent jurisdiction in merger, interconnection, and arbitration proceedings. Sprint raises as an example the "cooperative federalism" that grants states the authority to adjudicate interconnection disputes under Sections 251 and 252 of the Telecommunications Act of 1996 (the 1996 Act).

Looking outside of Ohio, Sprint finds that other states claim jurisdiction. According to Sprint, of the nine states that have addressed the enforcement of merger commitments, only Mississippi has decided that it does not have jurisdiction to enforce merger commitments.

(12) Going beyond mere recognition of jurisdiction, Sprint urges the Commission to exercise its jurisdiction. In so urging, Sprint argues that the Commission should not defer the matter to the FCC. Sprint contends that there is no concern for conflicting

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9 Chapter 47 U.S.C. §153 contains the definitions for the Communications Act of 1934. In particular, Sprint refers to 47 U.S.C. §153(41) which defines "state commission" as a "commission, board, or official (by whatever name designated) which under the laws of any state has regulatory jurisdiction with respect to intrastate operations of carriers."

and diverse results, as AT&T suggests. According to Sprint, AT&T already abides by state-specific requirements for interconnection. Citing a pending case in Louisiana, Sprint relates that the administrative law judge has recognized that holding the matter in abeyance has begun to cause problems and may lead to "collateral problems."

(13) Sprint states that it is not the only carrier to file for the enforcement of AT&T's merger commitments. In Michigan, XO Communications Services, Inc. has filed an application against AT&T Michigan. In Missouri, Verizon Wireless filed a complaint against Southwestern Bell Telephone Company dba AT&T Missouri. Sprint finds it to be an appropriate matter for state commissions when merger commitments are inextricably intertwined with interconnection matters.

(14) AT&T filed a reply in support of its motion to dismiss on November 29, 2007. AT&T maintains its position that the FCC has exclusive jurisdiction over the enforcement of merger commitments. AT&T asserts that Sprint mistakenly confuses the enforcement of Sections 251 and 252 of the Act with jurisdiction to enforce the FCC merger commitments. AT&T states that the FCC's Merger Order has no relation to the 1996 Act. While recognizing a scheme of implicit cooperative federalism in the realm of interconnection agreements, AT&T emphasizes that nothing in the Act implies that state commissions have authority to enforce merger commitments. The FCC's authority to approve mergers and enforce commitments, AT&T declares, arises from Sections 214 and 303(r) of the Communications Act of 1934 (the 1934 Act), not the 1996 Act. Moreover, argues AT&T, Sprint can point to no statute that grants a state commission authority to enforce merger commitments.

AT&T strongly rejects Sprint's assertion that Section 4905.04(B), Revised Code, grants the Commission authority to enforce merger commitments. AT&T states that Section 4905.04(B), Revised Code, is limited by 47 U.S.C. §153, which does not include enforcement of merger commitments. That Section 4905.04(B), Revised Code, was enacted the same year as 47 U.S.C. §153 makes the limitation clear. AT&T emphasizes that 47 U.S.C. §153(41) only encompasses arbitration, approval and enforcement of interconnection agreements, approval of

statements of generally available terms (SGATs), and consultation with the FCC concerning Bell operating companies' (BOCs) Section 271 applications. Consequently, AT&T concludes that Section 4905.04(B), Revised Code, does not authorize the Commission to enforce merger commitments. Without an authorizing statute, AT&T argues that Sprint's complaint must be dismissed. AT&T notes that other states, unlike Ohio, may have authorizing statutes.

Even if the Commission were to conclude that it has jurisdiction to enforce merger commitments, AT&T believes that the Commission should defer to the FCC. AT&T emphasizes that the issue in this case is not whether the Commission is better positioned than the FCC to determine appropriate interconnection arrangements in Ohio. Instead, the issue is about the interpretation of Merger Commitment 1. To AT&T, the FCC is the most appropriate forum. To avoid conflicting results, AT&T argues that the Commission must defer to the FCC. If 22 state commissions interpret and enforce the merger commitments, AT&T predicts that there will be conflicting and diverse opinions.

(15) In its motion to dismiss, AT&T argues that Sprint's complaint must be dismissed because it is premature. AT&T notes that the complaint is its first notice of Sprint's desire to port the agreement between AT&T Kentucky and Sprint. In support of its argument that the complaint is premature, AT&T explains that Sprint filed its complaint on October 26, 2007. On October 30, 2007, AT&T and Sprint filed the amendment that constitutes the contract extension that Sprint seeks to port. Consequently, AT&T argues that the agreement Sprint seeks to port did not come into existence until four days after Sprint filed its complaint. The filing of the complaint before the existence of the subject agreement, according to AT&T, makes the complaint premature. Moreover, AT&T points out that the agreement has yet to be approved by the Kentucky Commission. AT&T, therefore, concludes that the agreement is not legally effective.

(16) In its memorandum contra, Sprint rejects AT&T's assertion that its complaint is premature. Sprint points out that by letter dated July 10, 2007, it requested that AT&T port to Ohio the Kentucky version of a multi-state agreement between BellSouth

and Sprint. AT&T Kentucky and Sprint were parties to the Kentucky interconnection agreement. In a letter dated October 9, 2007, AT&T acknowledged receipt of the request to port the agreement between BellSouth and Sprint. Sprint notes that the BellSouth ICA is, effectively, the same as the Kentucky interconnection agreement. BellSouth conducts business in Kentucky as AT&T Kentucky.

Sprint also rejects that its complaint is premature because of AT&T's right to appeal the Kentucky Commission's order that extended the BellSouth ICA. AT&T argues that a court could overturn the commission's decision, rendering the agreement ineffective for porting. It is Sprint's contention that the agreement is effective until or unless AT&T obtains a preliminary injunction blocking the enforcement of the Kentucky decision. Sprint notes that AT&T has neither sought an appeal nor filed for injunctive relief.[10]

In its reply, AT&T maintains that the complaint is premature because the interconnection agreement that Sprint wants to port did not exist prior to the filing of the complaint in this matter. AT&T explains that Sprint filed its complaint on October 26, 2007. On October 30, 2007, Sprint and AT&T filed the amendment that extended the contract that Sprint seeks to port. The Kentucky Commission did not approve the amendment until November 7, 2007, rendering the amendment "effective." AT&T emphasizes that Merger Commitment 1 only allows the porting of "effective" agreements. AT&T, therefore, concludes that it was not required to port the agreement at that time. Making a distinction between the multi-state BellSouth agreement and the AT&T Kentucky agreement, AT&T points out that Sprint did not request to port the Kentucky version of the multi-state agreement nor the current form of the Kentucky agreement. Because there was no effective agreement to port at the time Sprint filed the complaint, AT&T concludes that the complaint must be dismissed.

(17) AT&T emphasizes, in its motion to dismiss, that the BellSouth ICA cannot lawfully be ported to Ohio "as is." Focusing on language in Merger Commitment 1, AT&T highlights that

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10 *Supra* note 8.

when an agreement is determined to be eligible for porting it must be reviewed against Ohio pricing and performance plans, technical feasibility in Ohio, and for consistency with Ohio laws and regulatory requirements. Recognizing these requirements, AT&T argues that the most the Commission can do, if it were to decide that it has jurisdiction, is rule that an agreement may be ported to Ohio subject to modifications.

(18) Rejecting AT&T's assertion, Sprint believes the AT&T Kentucky interconnection agreement with Sprint may be ported "as is." Sprint contends that AT&T never raised issues concerning Ohio-specific pricing, technical feasibility, or consistency of laws and regulatory requirements. If such issues exist, Sprint believes that AT&T should have raised the issues months ago in response to Sprint's July 10, 2007, request to port the agreement.

Sprint claims that the AT&T Kentucky interconnection agreement already identifies state-specific provisions within itself. Nevertheless, even in those circumstances where Ohio law impacts the agreement, Sprint states that the agreement could be modified quickly. For example, the agreement identifies state-specific interconnection rates for some of the BellSouth states. As a solution, the parties could insert a table containing the Ohio-specific rates.

In reply, AT&T declares that the AT&T Kentucky agreement cannot be ported "as is." According to AT&T, Merger Commitment 1 requires state-specific modification. Moreover, AT&T points out that Sprint admits that the AT&T Kentucky agreement would need to be modified by adding a table of Ohio-specific rates.

(19) AT&T asserts that this matter is not eligible for streamlined treatment or an expedited ruling. Guideline XVIII.C.2 of the Commission's Local Service Guidelines (Guidelines)[11] provide for a streamlined procedure for certain complaint cases. AT&T contends that the streamlined procedure is not available here. AT&T highlights that Guideline XVIII.C.2 only applies to complaints involving implementation of interconnection

11 *In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues*, Case No. 95-845-TP-COI (Entry on Rehearing issued February 20, 1997, Appendix A).

agreements filed pursuant to Section 4905.26, Revised Code. To AT&T's understanding, the provision only applies to existing interconnection agreements. By contrast, Sprint's complaint seeks to replace an agreement. The underlying intent of Guideline XVIII.C.2, according to AT&T, is to avoid undue delay in putting an interconnection agreement into place and to expedite competition. AT&T declares that no such considerations are at issue in this complaint proceeding. AT&T advises the Commission to be reluctant to adopt a schedule that forecloses the parties' ability to identify and resolve disagreements.

(20) Disagreeing with AT&T, Sprint affirms that this matter is eligible for a streamlined procedure. Sprint concedes that Rule 4901:1-7-28, Ohio Administrative Code (O.A.C.), was not effective at the time it filed its motion and has decided that there is no reason to discuss its applicability to this proceeding. Sprint, nevertheless, reserves its right to petition for application of the rule after it becomes effective. According to AT&T's interpretation, Guideline XVIII.C.2 provides for a streamlined complaint process to resolve disputes concerning the terms of an existing interconnection agreement. Sprint rejects this interpretation. First, Sprint points out that the Local Service Guidelines do not define the term "interconnection arrangement." In some circumstances, Sprint finds that the term does not connote an interconnection "agreement." According to Sprint, the streamlined complaint procedure is available to parties that have identified how to interconnect their networks but cannot reach an agreement to implement the arrangements. Sprint claims this conclusion comes from the plain reading of the Guidelines.

AT&T rejects Sprint's assertion that the streamlined procedure is available when parties have determined how to interconnect their networks but encounter disagreement in implementing arrangements. If Sprint's assertion were true, argues AT&T, then arbitrations under Section 252(b) of the 1996 Act would be subject to the streamlined procedure.

(21) AT&T urges the Commission to reject Sprint's request for an expedited ruling. First, AT&T notes that Rule 4901:1-7-28, O.A.C., which provides for expedited treatment, has been adopted but was not in effect when Sprint filed its complaint.

Even if the rule were in effect, AT&T proclaims that it would not be applicable. AT&T states that the rule applies only when the "dispute directly affects the ability of a telephone company to provide uninterrupted service to its customers or precludes the provisioning of any service, functionality or network element under an interconnection agreement." By virtue of Sprint operating under existing agreements, AT&T concludes that Sprint is barred from invoking Rule 4901:1-7-28, O.A.C. Moreover, AT&T contends that Sprint has failed to state specific circumstances that affect its ability to provide uninterrupted service, thereby justifying an expedited ruling.

(22) In its memorandum contra, Sprint conceded that Rule 4901:1-7-28, O.A.C., was not yet effective, rendering a discussion of its applicability unnecessary. Moreover, Sprint concluded that a further discussion of Rule 4901:1-7-28, O.A.C., would be unnecessary because the streamlined complaint procedure is available. Nevertheless, Sprint claimed a right to petition for the application of Rule 4901:1-7-28, O.A.C., after it becomes effective.

Noting that Sprint conceded that an expedited ruling is not available under Rule 4901:1-7-28, O.A.C., AT&T addresses the issue of whether the streamlined procedure in Guideline XVIII.C.2 is applicable. AT&T asserts that the streamlined procedure is not available. AT&T stresses that Guideline XVIIIC.2 applies only to complaints filed under 4905.26, Revised Code, involving the implementation of interconnection arrangements. AT&T emphasizes the distinction between the "implementation" of an interconnection arrangement and the "making" of an interconnection arrangement. Arguing plain meaning, AT&T contends that an arrangement must exist prior to implementation. Sprint's complaint, argues AT&T, involves the making of an interconnection arrangement, not an implementation.

(23) On November 20, 2007, the Commission issued an entry in the following cases: *In the Matter of the Commission Investigation Relative to the Establishment of Local Exchange Competition and Other Competitive Issues*, Case No. 95-845-TP-COI, *In the Matter of the Review of Chapter 4901:1-5, Ohio Administrative Code*, Case No. 05-1102-TP-ORD, and *In the Matter of the Establishment of Carrier-to-Carrier Rules*, Case No. 06-1344-TP-ORD. The entry

vacated the Local Service Guidelines and replaced them with new carrier-to-carrier rules that are set forth in Chapters 4901:1-6 and 4901:1-7 of the Ohio Administrative Code. Because the instant case was filed while the Local Service Guidelines were in effect, this case shall be governed by the Local Service Guidelines.

(24) A threshold issue in this proceeding is whether this case involves the implementation of an interconnection arrangement. Guideline XVIIIC.1. governs carrier-to-carrier complaints that do not involve the implementation of interconnection arrangements. Local Service Guideline XVIIIC.1. reads as follows:

> Under its authority pursuant to Section 4905.26, Revised Code, the Commission will consider carrier-to-carrier complaints. In carrier-to-carrier complaints concerning issues other than implementation of interconnection arrangements, the Commission will issue a procedural entry in these cases within 30 calendar days of the filing of the complaint, and will endeavor to conclude the case within 180 calendar days.

The parties, to this point, have adhered to Guideline XVIIIC.2. Guideline XVIIIC.2. sets forth the streamlined procedure for carrier-to-carrier complaints involving the implementation of interconnection agreements filed pursuant to Section 4905.26, Revised Code. This matter does not involve the implementation of an interconnection arrangement. There is no dispute concerning the terms or conditions of a negotiated, arbitrated, or existing interconnection agreement. Instead, at issue is whether a particular interconnection agreement is available for adoption and porting pursuant to a merger commitment approved by the FCC. Upon consideration of the facts and the arguments asserted by the parties, the Commission finds that this proceeding should be conducted pursuant to the provisions in Guideline XVIIIC.1.

(25) The parties agree that a key issue is whether this Commission has jurisdiction to enforce merger commitments. In *In the Matter of AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74 (Memorandum

Opinion and Order released March 26, 2007), the FCC promulgated the Merger Commitments in Appendix F of the Memorandum Opinion and Order. At the outset, the FCC stated the following:

> It is not the intent of these commitments to restrict, supersede, or otherwise alter state or local jurisdiction under the Communications Act of 1934, as amended, or over the matters addressed in these commitments, or to limit state authority to adopt rules, regulations, performance monitoring programs, or other policies that are not inconsistent with these commitments.

From this language, we conclude that the FCC clarified that the states have jurisdiction over matters arising under the commitments. Even more, states are granted authority to adopt rules, regulations, programs, and policies respecting the commitments.

Immediately after, and before setting forth the commitments, the FCC states the following: "For the avoidance of doubt, unless otherwise expressly stated to the contrary, all conditions and commitments proposed in this letter are enforceable by the FCC...." From this, we gather that the FCC sought to make clear that it retains jurisdiction over matters that could otherwise be considered exclusively within the jurisdiction of the states. In other words, the FCC, at first, establishes that states retain jurisdiction. To remove any doubt about its own jurisdiction, the FCC specifically states that it retains concurrent authority to enforce all conditions and commitments.

To shed additional light on the issue of jurisdiction, it is noteworthy that in Merger Commitment 1 the FCC mandated that interconnection agreements be subject to state-specific pricing, performance plans, and technical feasibility. To us, the existence of state-specific standards suggests that the states would be better qualified than the FCC to determine whether interconnection agreements adhere to unique state standards. Concluding that the FCC has specifically carved out a place for state jurisdiction in the enforcement of merger commitments, it

would be contrary to the FCC's policy aims to defer this matter to the FCC, as AT&T would urge us to do.

(26) AT&T argues that Sprint's complaint is premature, having been filed prior to the time that the interconnection agreement sought to be ported became "effective." AT&T draws a distinction between the AT&T Kentucky interconnection agreement with Sprint and the BellSouth ICA. AT&T emphasizes that the AT&T Kentucky interconnection agreement became effective after the complaint. Sprint, on the other hand, considers the BellSouth ICA and the AT&T Kentucky interconnection agreement to be the same.

In Sprint's July 10, 2007, letter, Sprint specifies that it wishes to port to the State of Ohio the agreement between BellSouth Telecom, Inc. (AT&T) and Sprint Communication Co., L.P. and Sprint Spectrum L.P. in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee. AT&T responded to the port request by letter dated October 9, 2007. In a footnote, AT&T states that BellSouth Telecommunications, Inc. does business in Kentucky as "AT&T Kentucky."

AT&T's distinction between the two agreements appears to be an emphasis of form over substance. Based on AT&T's correspondence and Sprint's arguments, we agree with Sprint that the BellSouth ICA and the AT&T Kentucky agreement are the same. Hence, AT&T received notice of Sprint's intent to port the agreement when AT&T received Sprint's July 10, 2007, letter, not when AT&T received Sprint's October 26, 2007, complaint.

AT&T argues that the interconnection agreement that Sprint seeks to port was not legally effective when Sprint filed the complaint. Because Sprint filed the complaint during the absence of a contract extension, AT&T concludes that the complaint is premature. The flaw that AT&T points to is addressed by Merger Commitment 4.[12]

This provision would allow Sprint to extend its ported agreement notwithstanding that the agreement had expired

12 *Supra* note 7.

within a prior three-year period. During such three-year period, assuming that neither party notified the other to terminate or renegotiate, the interconnection agreement should be regarded as "effective." Owing to the extended "effective" period, Sprint's complaint is not premature.

(27) The parties dispute whether the Kentucky interconnection agreement may be ported "as is." We agree with AT&T that Sprint effectively concedes that the agreement may require a modification of rates to suit Ohio standards. Such a modification, however, is contemplated by merger commitment 1. That an agreement may be subject to state-specific pricing is not a bar to its portability.

(28) Based on our findings and conclusions, AT&T's motion to dismiss should be denied. Moreover, we find that we have concurrent jurisdiction with the FCC over this matter and that we have authority to interpret the FCC's Merger Commitments. In reviewing the facts of this matter along with the Merger Commitments, we conclude that it is consistent with the FCC's Merger Commitments that Sprint be allowed to port the interconnection agreement subject to state-specific modifications.

It is, therefore,

ORDERED, That Sprint shall be permitted to port to Ohio the BellSouth ICA, subject to state-specific modifications. It is, further,

ORDERED, That AT&T's motion to dismiss is denied. It is, further,

ORDERED, That a copy of this Finding and Order be served upon the parties, their respective counsel, and all interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Alan R. Schriber, Chairman

Paul A. Centolella

Ronda Hartman Fergus

Valerie A. Lemmie

Donald L. Mason

LDJ/vrm

Entered in the Journal

FEB 05 2008

Reneé J. Jenkins
Secretary

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

IN THE MATTER OF PETITION FOR APPROVAL OF NEXTEL SOUTH CORP.'S ADOPTION OF THE INTERCONNECTION AGREEMENT BETWEEN SPRINT COMMUNICATIONS L.P., SPRINT SPECTRUM L.P. D/B/A SPRINT PCS AND BELLSOUTH TELECOMMUNICATIONS, INC. D/B/A AT&T SOUTH CAROLINA D/B/A AT&T SOUTHEAST	)	Docket No. 2007-255-C
IN THE MATTER OF PETITION FOR APPROVAL OF NPCR, INC. D/B/A NEXTEL PARTNERS' ADOPTION OF THE INTERCONNECTION AGREEMENT BETWEEN SPRINT COMMUNICATIONS L.P., SPRINT SPECTRUM L.P. D/B/A SPRINT PCS AND BELLSOUTH TELECOMMUNICATIONS, INC. D/B/A AT&T SOUTH CAROLINA D/B/A AT&T SOUTHEAST	)	Docket No. 2007-256-C

This is to certify that I have caused to be served this day, one (1) copy of **Nextel's Brief in Support of Nextel's Adoption of the BellSouth-Sprint ICA** by placing a copy of same in the care and custody of the United States Postal Service (unless otherwise specified), with proper first-class postage affixed hereto and addressed as follows:

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February 28, 2008
Columbia, South Carolina